



# 2007 Judges' Sentencing Reference Manual

Circuit & District Judges' Annual Conference

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**Alabama Sentencing Commission**

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## I. Alabama General Penalty Provisions and Enhancements

### A. Felonies § 13A-5-6 and § 13A-5-11

Current Offense	Penalty	Minimum Penalty if Firearm/Deadly Weapon Used/Attempted	Minimum Mandatory Child Sex Offenders*
<b>Class A Felony</b>	10-99 years or life in state penitentiary  Fine up to \$20,000	20 years imprisonment	20 years plus 10 years post-incarceration supervision (part of sentence)
<b>Class B Felony</b>	2-20 years imprisonment**. Fine up to \$10,000	10 years imprisonment	10 years imprisonment
<b>Class C Felony</b>	1 (+1 day) - 10 years imprisonment**  Fine up to \$5,000	10 years	

\* Sex Offenses involving a child victim under 12 years of age and child pornography offenses involving children under the age of 17.

\*\* Imprisonment of 3 years or less can be ordered to be served in the county jail or penitentiary. Section 15-18-1(b) *Code of Alabama* 1975.

### B. Misdemeanors & Violations - § 13A-5-7, § 13A-5-12 and § 11-45-9

Offense	Imprisonment	Fine
<b>Class A</b>	Not to exceed 1 year	Not more than \$2,000*
<b>Class B</b>	Not to exceed 6 months	Not more than \$1,000*
<b>Class C</b>	Not to exceed 3 months	Not more than \$500*
<b>State Violation</b>	Not to exceed 30 days	Not more than 200*
<b>Municipal Ordinance Violation</b> § 11-45-9	Not to exceed 6 months (Except for DUI offenses where maximum is one year imprisonment or hard labor)	Not to exceed \$500 (Except for DUI where maximum fine is \$5,000)

\*or any amount not exceeding double the pecuniary gain to the offender or loss to the victim caused by the commission of the offense.

## II. Sentence Enhancement

### A. Enhancements for Prior Felony Conviction History (Application of §13A-5-9, Habitual Felony Offender Act).

Current Offense	No Prior Felony Convictions	One Prior Felony Conviction	Two Prior Felony Convictions	Three+ Prior Felony Convictions
<b>Class A Felony</b>	10-99 years or life in state penitentiary.  Fine up to \$20,000.	15-99 years or life in state penitentiary.  Fine up to \$20,000.	Life imprisonment or any term of years not less than 99 years.  Fine up to \$20,000.	<b><i>No prior Class A Felony convictions:</i></b> Mandatory imprisonment for life or life imprisonment without possibility of parole. Fine up to \$20,000.  <b><i>One or more prior Class A Felony convictions:</i></b> Mandatory imprisonment for life without possibility of parole.  Fine up to \$20,000.
<b>Class B Felony</b>	2-20 years imprisonment*.  Fine up to \$10,000.	10-99 years or life in state penitentiary.  Fine up to \$20,000.	15-99 years or life in state penitentiary.  Fine up to \$20,000.	Minimum of not less than 20 years or life imprisonment.  Fine up to \$20,000.
<b>Class C Felony</b>	1 (+1 day) - 10 years imprisonment*.  Fine up to \$5,000.	2-20 years in state penitentiary.  Fine up to \$10,000.	10-99 years or life in state penitentiary.  Fine up to \$20,000	15-99 years or life in state penitentiary.  Fine up to \$20,000.

\* **Imprisonment of 3 years or less** can be ordered to be served in the county jail or penitentiary.  
Section §15-18-1(b) *Code of Alabama* 1975.

## B. Enhancements/Mandatory Minimums for Specific Offenses

Statute	Offense	Enhancements/Minimum Mandatories
§13A-5-6	Firearm Enhancements (General) Act 81-840, effective 5/27/81	Class A: Minimum 20 years Class B or C: Minimum 10 years
§13A-5-6 (4) &(5)  §13A-5-6(c)  §13A-5-2(d)  <u>But see</u> §15-18-8(b)	Child Sex Offenses Act 2005-301, effective 10/1/05	Class A: Minimum 20 years Class B: Minimum 10 years  10 years post- release supervision mandatory additional penalty to be included in sentence for Class A child sex offenders.  No probation for any child sex offender.  Prohibits probation on split sentence for only Class A and B felony offenders.
§15-22-27.3  §13A-5-2(d) & §15-18-8(b)  §13A-5-6(c)	Child Sex Offenders Committing Class A or B Felony  Class A felony Child Sex Offenders	No possibility of parole.  No possibility of probation or split sentence.  10 years post- release supervision mandatory additional penalty to be included in sentence.
§13A-6--69  §15-20-21(4)(e) §13A-5-2(d)	Enticing a child to enter a vehicle, house, etc. for immoral purposes	.Class C Felony – 1 year and 1 day  Classified as Child Sex Offender No probation <u>But see</u> §15-18-8(b) prohibiting split sentence only for Class A or B felony offenders.
§13A-5-13	Hate Crimes Act 94-581, effective 4/21/94	Class A: 15 years Class B: 10 years Class C: 2 years
§13A-6-130	Domestic Violence 1st Degree -- 2nd and subsequent Act 2000-266, effective 7/1/2000	1 year without possibility of probation, parole, or good time.  If committed in violation of a protection order: Minimum doubled without possibility of probation, parole, or good time.
§13A-6-131	Domestic Violence 2nd Degree -- 2nd and subsequent Act 2000-266, effective 7/1/2000	6 months without possibility of probation, parole, or good time. If committed in violation of a protection order: Minimum doubled without possibility of probation, parole, or good time.
§13A-10-152	Terrorism Act 2002-431, effective 4/21/02	Murder: Death Class A other than murder: Life without parole Class B: Class A (10-99 years/life) Class C: Class B (2-20 years)
§13A-11-60	Possession & sale of brass or steel teflon-coated handgun ammunition Act 82-509, effective 7/82	Additional consecutive punishment of 3 years in the penitentiary.



§32-5A-191(h)	Felony DUI – Class C Felony 4 <sup>th</sup> or subsequent DUI conviction  Act 94-591, effective 4/22/94	One year and one day nor more than 10 years, or 10 days mandatory imprisonment in county jail if as a condition of probation the defendant is enrolled and completes an approved chemical dependency program.  Fine of \$4,100 but not more than \$10,100 5 year revocation of driver's license  HFOA does not apply §32-5A-191 (h)
§32-5A-191	Misdemeanor DUI  Note: Any person convicted of driving under the influence of alcohol or controlled substance more than once in a 5 year period “shall have his/her motor vehicle registration for all vehicles owned by the repeat offender suspended by the Alabama Department of Revenue for the duration of the license suspension/revocation period, unless such action would impose an undue hardship to any individual, not including the repeat offender, who is completely dependent on the motor vehicle for necessities of life, including any family member of the repeat offender and any co-owner of the vehicle.	1 <sup>st</sup> – Not more than 1 year imprisonment Fine \$600 but not more than \$2,100* 90 days driver's license suspension  2 <sup>nd</sup> (within five years) Not more than 1 year imprisonment <i>Mandatory Imprisonment for 5 days</i> <i>or</i> <i>Not less than 30 days community service</i> Fine \$1,100 and not more than \$5,100* 1 year revocation of driver's license  3 <sup>rd</sup> Not less than 60 days but not more than 1 year imprisonment; minimum mandatory of 60 days) Fine \$2,100 and not more than \$10,100 3 year revocation of driver's license <i>Must also refer to CRO program</i>
§32A-5A-191(n)	DUI with passenger under 14 years of age Act 99-556, effective 9/1/99	Double minimum punishment.
§13A-8-51(2)	Pharmacy Robbery Act 82-434, effective 7/4/82	Hard labor for not less than 10 years nor more than 99 years and not eligible for parole, probation, or suspension of sentence.  Second or subsequent convictions – defendant must be imprisoned for life without parole.
§15-22-27.1	Repeat felony offender of serious physical injury offenses – subsequent conviction within 5 years of murder, rape, robbery, or assault with a deadly weapon (or attempts) resulting in serious physical injury.	No possibility of parole.
§15-23-27.2	Two Time Class A felony – Life without Parole	Repealed – Follow HFOA
§13A-12-215	Selling, furnishing controlled substance to child (under 18)	Class A Felony (10-99 yrs/life.). Cannot be suspended or probated.
§13A-12-250	Drug sale within 3 mile radius of school	Additional 5 years imprisonment.  (If split, can suspend – <i>see Soles v. State</i> , 820 So.2d 163 (Ala.Crim.App. 2001))
§13A-12-270	Drug sale within 3 mile radius of housing project	Additional 5 years imprisonment.  (If split, can suspend – <i>see Soles v. State</i> , 820 So.2d 163 (Ala.Crim.App. 2001))

§13A-12-233	<p>Drug Trafficking Enterprise Act 90-471, effective 5/18/90</p> <p>Drug Baron's Enforcement Act of 1986 Act 86-543, effective 4/30/86</p> <p>Drug Trafficking -Act 80-587, effective 5/28/80</p>	<p><b>1st conviction:</b> 25 yrs. min. up to &amp; inc. life w/o parole and fine of no less than \$50,000 nor more than \$500,000.</p> <p><b>2nd conviction:</b> mandatory term of life w/o parole and fine not less than \$150,000 nor more than \$1 million.</p>
§13A-12-231(13)	Drug trafficking while in possession of firearm Act 90-389, effective 4/17/90	<p>Additional 5 years not subject to suspension or probation &amp; mandatory \$25,000 <u>mandatory</u> fine.</p> <p><i>Carter v. State</i>, 812 So.2d 391 (Ala.Cr.App. 2001)</p> <p><i>Imposition of \$25,000 fine in connection with firearm enhancement is mandatory and the defendant must be informed thereof prior to accepting guilty plea.</i></p>
§13A-12-231(1)(a)	Trafficking Cannabis: In excess of one kilo or 2.2 pounds but less than 100 pounds	Minimum 3 years and \$25,000 fine.
§13A-12-231(1)(b)	Trafficking Cannabis: 100 pounds or more but less than 500 pounds	Minimum 5 years and \$50,000 fine.
§13A-12-231(1)(c)	Trafficking Cannabis: 500 pounds or more but less than 1,000 pounds	Minimum 15 years and \$200,000 fine.
§13A-12-231(1)(d)	Trafficking Cannabis: 1,000 pounds or more	Life imprisonment without parole
§13A-12-231 (3) & (9)	Trafficking Morphine, Opium, Heroin & Lysergic Acid Diethylamide: 4 grams or more but less than 14 grams	Minimum 3 years and \$50,000 fine.
§13A-12-231 (3) & (9)	Trafficking Morphine, Opium, Heroin & Lysergic Acid Diethylamide: 14 grams or more but less than 28 grams	Minimum 10 years and \$100,000 fine.
§13A-12-231 (3) & (9)	Trafficking Morphine, Opium, Heroin & Lysergic Acid Diethylamide: 28 grams or more but less than 56 grams	Minimum 25 years and \$500,000 fine.
§13A-12-231 (3) & (9)	Trafficking Morphine, Opium, Heroin & Lysergic Acid Diethylamide: 56 grams or more	Life imprisonment without parole.
§13A-12-231 (8)	Trafficking Phencyclidine or mixture: 4 grams or more, but less than 14 grams	Minimum 3 years and \$50,000 fine.
§13A-12-231 (8)	Trafficking Phencyclidine or mixture: 14 grams or more, but less than 28 grams	Minimum 5 years and \$100,000 fine.
§13A-12-231 (8)	Trafficking Phencyclidine or mixture: 28 grams or more, but less than 56 grams	Minimum 15 years and \$250,000 fine.
§13A-12-231 (8)	Trafficking Phencyclidine or mixture: 56 grams or more	Life imprisonment without parole.
§13A-12-231 (4)	Trafficking Methaqualone: 1,000 but less than 5,000 pills	Minimum 3 years and \$50,000 fine.
§13A-12-231 (4)	Trafficking Methaqualone: 5,000 but less than 25,000 pills	Minimum 10 years and \$100,000 fine.
§13A-12-231 (4)	Trafficking Methaqualone: 25,000 but less than 100,000 pills	Minimum 25 years and \$500,000 fine.
§13A-12-231 (4)	Trafficking Methaqualone: 100,000 or more pills	Life imprisonment without parole.
§13A-12-231 (5)	Trafficking Hydromorphone: 500 but less than 1,000 pills	Minimum 3 years and \$50,000 fine.
§13A-12-231 (5)	Trafficking Hydromorphone: 1,000 but less than 4,000 pills	Minimum 10 years and \$100,000 fine.

§13A-12-231 (5)	Trafficking Hydromorphone: 4,000 but less than 10,000 pills	Minimum 25 years and \$100,000 fine.
§13A-12-231 (5)	Trafficking Hydromorphone: 10,000 or more pills	Life imprisonment without parole.
§13A-12-231 (2), (6), (7), (10), (11)	Trafficking cocaine or mixture, methylenedioxy amphetamine or mixture, methoxy ethylenedioxy amphetamine or mixture, amphetamine or mixture, methamphetamine or mixture: 28 grams but less than 500 grams	Minimum 3 years and \$50,000 fine.
§13A-12-231 (2), (6), (7), (10), (11)	Trafficking cocaine or mixture, methylenedioxy amphetamine or mixture, methoxy ethylenedioxy amphetamine or mixture, amphetamine or mixture, methamphetamine or mixture: 500 grams or more but less than one kilo	Minimum 5 years and \$100,000 fine.
§13A-12-231 (2), (6), (7), (10), (11)	Trafficking cocaine or mixture, methylenedioxy amphetamine or mixture, methoxy ethylenedioxy amphetamine or mixture, amphetamine or mixture, methamphetamine or mixture: one kilo but less than 10 kilos	Minimum 15 years and \$500,000 fine.
§13A-12-231 (2), (6), (7), (10), (11)	Trafficking cocaine or mixture, methylenedioxy amphetamine or mixture, methoxy ethylenedioxy amphetamine or mixture, amphetamine or mixture, methamphetamine or mixture: 10 kilos or more.	Life imprisonment without parole.
§13A-12-231(12)	Habitual offenders convicted of drug trafficking	Sentence provided in drug statute or HFOA, whichever is greater
§13A-12-231(12)	Minimum mandatory sentence for drug trafficking exceptions	Mandatory minimum term of imprisonment prescribed under Drug Trafficking Act or 15 years, whichever is less. Reduction is authorized for a defendant sentenced to any term except life imprisonment without parole, if (s)he provides substantial assistance in the arrest or conviction of any accomplices, accessories, co-conspirators, or principals. Motion must be made by district attorney; a judge may not reduce or suspend a sentence <i>ex mero moto</i> .

### III. Punishment Generally

Section 15-18-1(a), Code of Alabama 1975 provides that “[t]he only legal punishments, besides removal from office and disqualification to hold office, are fines, hard labor for the county, imprisonment in the county jail, imprisonment in the penitentiary, which includes hard labor for the state, and death.

#### A. Place of Imprisonment

##### **Imprisonment in Penitentiary or County Jails - § 15-18-1**

Imprisonment or hard labor *more than 12 months but not more than 3 years* – judge may sentence to **confinement in the county jail, hard labor for the county or imprisonment in the penitentiary.**

Period of Imprisonment in penitentiary/hard labor for the county *for more than 3 years* – Imprisonment **must be in the penitentiary.** (*But see* amended §15-18-8 providing that a sentence of 20 years imprisonment may be split with the sentencing judge ordering confinement in “a prison, jail type institution, or treatment institution for a period not exceeding five years.”)

#### B. Sentence Types

##### **1. Multiple Sentences: How Served**

The following types of sentences are utilized in Alabama:

**Consecutive:** Two or more sentences that are served at separate times, in sequence. One begins when the other ends. For example if a defendant receives consecutive sentences of 10 years and 5 years, the total amount of incarceration is 15 years.

Multiple sentences run consecutively, unless otherwise ordered. Rule 26.12 of the Alabama Rules of Criminal Procedures provides that “separate sentences of imprisonment imposed on a defendant for two or more offenses shall run consecutively, unless the judge at the time of sentencing directs otherwise, whether they are charged in the same charging instrument or by separate charging instruments.” The rule further provides that previously imposed consecutive sentences may be modified at any time to run concurrently by the court issuing a nunc pro tunc order.

**Concurrent:** Two or more sentences which are served at the same time, simultaneously. For example if a defendant is sentenced to serve concurrent sentences of 20 years and 5 years, the total imprisonment is 20 years. When a subsequent sentence is run concurrent with an existing sentence then the two sentences overlap, and would not necessarily end at the same time. Good time is computed on each case separately and then the period of longest incarceration governs for establishing release date.

**Coterminous:** A sentence that ends at the same time as the one the defendant is now serving. A sentence that terminates upon completion of the inmate's other sentence. The effect is to accord retroactive effect to subsequent sentence, basically making the sentence run concurrent and commencing at a date prior to the time the sentence is imposed.

Example: A defendant that has served 6 years of a 10 year sentence is subsequently convicted and sentenced to another 5 years to be served coterminous with his current sentence. The defendant will complete both sentences in 4 years, since they both end at the same time. If the second sentence was concurrent, the two sentences would overlap and the defendant would be required to serve an additional year for a total of 5 years.<sup>1</sup>

## **2. Straight Probation**

For any defendant whose punishment is fixed at 15 years or less,<sup>2</sup> the sentencing judge is authorized to suspend the execution of the sentence and place the defendant on probation or "impose a fine within the limits fixed by law and also place the defendant on probation." §15-22-50, *Code of Alabama 1975*

### 5 Year Limitation for Felons

Although the court determines the period of probation or suspension of execution of the sentence, no defendant convicted of a felony may be placed on straight probation for a period exceeding five (5) years. § 15-22-54

### 2 Year Limit Applies to Misdemeanor Convictions

The maximum probation period of a defendant guilty of a misdemeanor cannot exceed two years. §15-22-54

### 3-Year Limitation Applies to Youthful Offenders

Pursuant to § 15-19-6, the maximum period of probation that may be required of a defendant granted youthful offender status is three years. The Alabama Supreme Court has held that trial courts cannot impose consecutive probationary sentences that would contravene this limitation. *Jackson v. State*, 415 So.2d 1169 (Ala. 1994).

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<sup>1</sup> Although "coterminous" sentences are not mentioned in the Code or Criminal Rules of Procedure, this type of sentence has been negotiated in plea agreements and imposed by some trial courts.

<sup>2</sup> Alabama's Split Sentence Act (§ 15-18-8) was amended in 2000 to apply to persons sentenced to more than 15 years but not more than 20 years imprisonment, with the authorized sentence of no less than 3 and nor more than 5 years confinement in a prison, jail-type institution or treatment institution, with the remainder of the sentence suspended. Section 15-22-50 relating to straight probation (with a maximum term of supervision for felony offenders 5 years), which excluded defendants sentenced to death or imprisonment in the penitentiary for more than 15 years. was *not* amended and continues to include these restrictions.

### 3. Suspension of Sentence – General Probation Statute - § 15-22-50

Only applicable to defendants convicted and sentenced to imprisonment for not more than 15 years. Section 15-22-50 authorizes circuit and district courts to suspend the execution of a sentence and place a defendant on probation: “[T]he court, after a plea of guilty, after the returning of a verdict of guilty by the jury or after the entry of a judgment of guilty by the court, may suspend execution of sentence and place the defendant on probation, or may impose a fine within the limits fixed by law and also place the defendant on probation.”

### 4. Split Sentence - §15-18-8

#### a. Generally

Section 15-18-8, referred to as the Split Sentence Act, is a creation of the legislature intending to give judges discretion to avoid the potentially harsh consequences of the Habitual Felony Offender Act. However, the Split Sentence is not limited to cases sentenced under the HFOA. It is available for any sentence of imprisonment for 20 years or less.

This sentencing option has gained increased support over the years and is now commonly utilized by trial judges. Section 15-8-8, *Code of Alabama* 1975 can be utilized for any offender convicted and sentenced to a period of incarceration of 20 years or less, restricting the actual term of imprisonment as follows:

Sentence of ***up to 15 years imprisonment - no more than 3 years actual confinement*** (which is not subject to parole or good time deductions), with remainder of the sentence suspended.

Sentence of ***greater than 15 but not more than 20 years imprisonment - not less than three but no more than five years confinement*** (which is not subject to parole or good time deductions), with the remainder of the sentence suspended.

(Applicable only for defendants sentenced on or after May 25, 2000, or whose sentence was not final in the trial court on May 25, 2000.)

#### Suspension of Terms of Imprisonment Authorized

For Sentences of more than 15 years and not more than 20 years imprisonment, court must order imprisonment of no less than 3 years; however, all or part of this sentence can be suspended. *McCormick v. State*, 932 So.2d 124 (Ala. 2005)

#### Mandatory 3-Mile Radius Enhancement Can Be Suspended

In *Soles v. State*, 820 So.2d 163 (Ala.Crim.App.2001), the Alabama Supreme Court held that under the Split Sentence Act as amended in 2000 a trial judge can suspend a sentence imposed pursuant to the school/housing enhancements.

## **Split Sentence - §15-18-8**

*Example:* Dan Dealing was convicted of the unlawful sale of a controlled substance, a Class B Felony) which is punishable by imprisonment in the penitentiary for 2-20 years. If the offense occurred within three miles of a school there would be a mandatory five year enhancement and an additional five year enhancement if the sale is also within three miles of a public housing project. The minimum sentence would be 12 years.

Before the *Soles* decision, the 10 years enhancement could not be probated, however, after *Soles*, the court can impose a split sentence, suspending all or a portion of the sentence, including the enhancements.

### Retained Jurisdiction

“ Regardless of whether the defendant has begun serving the minimum period of confinement ordered under the provisions of subsection (a), the court *shall retain jurisdiction* and throughout that period to suspend that portion of the minimum sentence that remains and place the defendant on probation, notwithstanding any provision of the law to the contrary and the court may revoke or modify any condition of probation or may change the period of probation.” § 15-18-8(c)

### No Good Time or Parole

“No defendant serving a minimum period of confinement ordered under the provisions of subsection (a) shall be entitled to parole or to deductions from his or her sentence under the Alabama Correctional Incentive Time Act, during the minimum period of confinement so ordered; provided, however, that this subsection shall not be construed to prohibit application of the Alabama Correctional Incentive Time Act to any period of confinement which may be required after the defendant has served such minimum period.” § 15-18-8(g)

## **b. Revoking Probation on Split/Modification**

1. Split on a Split - A defendant under a split can be revoked and receive another split, but only if he has not served the maximum 3 years (for a sentence of 15 years or less) or 5 years (for 20 years or less). If he is given another split, the judge can only impose imprisonment for the remainder up to the maximum imprisonment authorized under a split – during which time the defendant will not be eligible for good time or parole. *Phillips v. State*, 932 So.2d 165 (Ala.Crim.App. 3/18/05); *Dixon v. State*, 912 So.2d 292 (Ala.Crim.App. 2005)

2. The trial court retains jurisdiction over a defendant sentenced to a split even after he has served the term of imprisonment [*Dixon v. State*, 912 So.2d 292 Ala.Crim.App. 2005), overruling *Hollis v. State*, 845 So.2d 5 (Ala.Crim.App. 2002)], but cannot increase the sentence.

3. A consecutive sentence can be amended to a concurrent sentence, but not vice-versa.
4. Upon revocation of the probation portion of a split the court can
  - 1) revoke the suspended sentence and the defendant serves the remainder of his sentence term (with credit for time served).
  - 2) revoke a portion of the suspended sentence and require the defendant to be incarcerated for any time up to the maximum imprisonment for a split (3 or 5 years).

Where the defendant has been sentence to the maximum term of imprisonment authorized under the split sentence statute, has been released on probation which is subsequently revoked, the judge's only alternative is to revoke the remainder of the sentence that was originally suspended.

5. Time imposed after revocation would entitle defendant to good time (if not otherwise excluded and parole consideration.

#### **c. Boot Camp**

Pursuant to § 15-18-8(a)(2), trial courts may commit certain defendants sentenced under the Split Sentence Act to a disciplinary rehabilitation program (Boot Camp) under the operation of the Department of Corrections, after consultation with the Commissioner. Participation in this program is only for a certain time period (not less than 90 nor more than 180 days) and is governed by departmental rules and regulations.

### **5. Community Corrections and Punishment Act**

Title 15, Chapter 18, Article 9, *Code of Alabama 1975*

Notwithstanding any law to the contrary, judges are authorized to sentence eligible offenders to appropriate community-based punishment programs either in conjunction with a split sentence, as an alternative to prison, or as a condition of probation. In sentencing offenders to any community-based alternative program, the court is authorized to set the duration of the sentence for the offense committed "to any period of time up to the maximum sentence within the appropriate range for the particular offense." § 15-18-175(d), *Code of Alabama 1975*.

The Community Punishment and Corrections Act of 1991, *as amended by Act 2003-353, effective 7/20/03*, (Sections 15-18-170 through 15-18-185, *Code of Alabama 1975*), provides for community-based punishment alternatives such as day reporting, home detention, electronic monitoring, half-way houses, restitution programs, community service, education and intervention programs and inpatient and out-patient substance abuse treatment programs.





## **IV. Procedures Relating to Sentencing – Alabama Criminal Rules**

### **Presentence Investigation (PSI) Report – Felonies**

A written report of a presentence investigation may be required in any case in which the court has discretion over the penalty to be imposed or authority to suspend execution of the sentence. For felony offenses, a presentence report is required upon written motion made by either party or on motion of the court. When required, the defendant is not to be sentenced until the presentence investigation (PSI) report has been presented to and considered by the court. §13A-5-5

Effective March 10, 2005, either a presentence or postsentence investigation report must be filed on every defendant convicted of a felony offense and the report must be in an electronic format. Act 2006-218, amending §13A-5-5

Prior to the sentencing hearing copies of the must be furnished to the court, the district attorney, the defense attorney or, when not represented by counsel, the defendant.

*Rule 26.3, Alabama Rules of Criminal Procedure.*

PSI Reports are not public records. *Rule 26.5(c) Alabama Rules of Criminal Procedure*

Rule 26.2 directs that the judgment of guilt and the pronouncement of the sentence should be entered at the same time. Pre-sentence reports are available for the trial courts as follows:

1. *All Offenses.* The court may require a pre-sentence report in all cases in which it has either discretion over the penalty to be imposed or authority to suspend execution of the sentence.
2. *Felony Offenses.* On motion of the court or written motion of either party, the court shall require a written report of a pre-sentence investigation of a defendant convicted of a felony, and such defendant shall not be sentenced or otherwise disposed of before such report has been presented to and considered by the Court.

### **Contents**

This Rule provides that the pre-sentence report may include the following information.

A statement of:

1. the offense and the circumstances surrounding it;
2. the defendant's prior criminal and juvenile record, if any;
3. the defendant's educational background;
4. the defendant's employment background, financial condition, and military record, if any;
5. the defendant's social history, including family relationships, marital status, interests, and activities, residence history, and religious affiliations;

6. the defendant's medical and psychological history, if available; and
7. Victim Impact Statements; and
8. Any other information required by the court.

It has been recommended that the report be accompanied by a copy of the defendant's and co-defendant's confession or other pretrial statement. In the case of sexual offenses, the pre-sentence report includes the victims' statements.

### **Pronouncement of Judgment and Sentence**

To sentence a defendant means to pronounce the penalty imposed upon the offender after a judgment of guilty. Rule 26.2 of the Alabama Rules of Criminal Procedure directs that the judgment of guilt and the pronouncement of sentence should be entered at the same time.

Although the 26.2 A.R.Cr.P. expresses a preference for judgment of guilt and sentence be pronounced at the same time, interpreting its predecessor temporary procedural rule, the Court of Criminal Appeals held that simultaneous in-court pronouncement of judgment and sentence are not required. *Edwards v. State*, 505 So.2d 1297 (Ala.Crim.App. 1987).

Judgment must be announced in open court and must reflect the plea, verdict, findings, if any, and the adjudication. Before sentence is imposed, the defendant must be given an opportunity to make a statement in his or her own behalf. The right to **allocution** applies regardless of the gravity of the sentence imposed. *Davis v. State*, 747 So.2d 921 (Ala.Crim.App. 1999). In addition, the court must explain **pre-trial credit**, i.e., state that the defendant will be allowed credit on his or her sentence for any time he has been incarcerated on the present charge, explain the **terms of the sentence**, and notify defendant of his/her **right to appeal**.

**Minute Entries:** The clerk is required to keep a case action summary sheet in each case, noting the proceedings and actions, along with their dates. The case action summary is considered the official minutes of the case and certified copies are admissible to prove prior convictions.

Rule 26.9 *Alabama Rules of Criminal Procedure*

## **SENTENCING ORDERS:**

Since judges are not allowed to respond to criticism of sentencing decisions, one of the most effective ways to inform victims and the public of the reasons for your decision is through a written sentencing order. A well reasoned, and well written sentencing order in a high profile or controversial case can be an effective tool for reducing criticism of your sentencing decision.

### **Sentence Hearing**

For felony offenses, the court must conduct a sentence hearing and pronounce sentence. The only instances in which a hearing may be avoided are (1) when the court has no discretion as to the penalty to be imposed and no power to suspend execution of the sentence or (2) when a hearing is waived by the parties with the consent of the court.

**When Held:** After determination of guilt or continued by the court to a later date. If a PSI is required, the sentence hearing cannot be held until copies have been made available or furnished to the court and parties.

**Evidence:** Can be presented by defendant and State on any issue the court deems probative on the issue of sentence, i.e., nature and circumstances of offense; defendant's character, background, mental and physical condition, or history; financial gain to the defendant; loss suffered by the victim(s), or any aggravating or mitigating factor. The court determines the probative value of evidence and admissibility, Rules of Evidence do not govern.

**BOP:** Disputed facts are determined by "preponderance of evidence" standard.

**HFO:** If a hearing is necessary to establish prior convictions, the State is required to give reasonable notice to defendant and assumes the burden of proof to show prior convictions. In determining disputed facts, "beyond a reasonable doubt" standard of proof applies. Convictions from other jurisdiction can be used for enhancement if they would have been a felony under Alabama law on or after Jan. 1, 1980. Federal crimes are considered a felony conviction if punishable by imprisonment in excess of one year under federal law, even if not punishable under Alabama law.

*Rule 26.6 Alabama Rules of Criminal Procedure.*



<b>State of Alabama</b> <b>DRAFT</b>	<b>CASE ACTION SUMMARY CONTINUATION</b>	<b>CASE NUMBER</b> <b>DRAFT</b>
<b>Style: State of Alabama v. _____</b>		
<b>JUDGE'S NOTES AND ORDERS</b>		

The defendant with counsel, \_\_\_\_\_, and Deputy District Attorney, \_\_\_\_\_, appeared in open court for the defendant to be sentenced on his/her conviction of \_\_\_\_\_, in violation of § \_\_\_\_\_, of the *Code of Alabama (1975)*.

IT IS THE JUDGMENT OF THE COURT that the defendant is guilty of \_\_\_\_\_.

**Habitual Felony Offender**

The defendant has been given reasonable notice that the State intended to move the Court to sentence the defendant under the provisions of § 13A-5-9 and 10 of the *Code of Alabama (1975)*.

The State’s motion to sentence the Defendant pursuant to the Habitual Felony Offender Act is hereby \_\_\_\_ Granted  
\_\_\_\_ Denied.

The Court finds that the Defendant has \_\_\_\_\_ prior conviction(s), to-wit: \_\_\_\_\_.

**Sentencing Hearing**

The Court conducted a sentencing hearing with the Defendant and his/her counsel present.

A pre-sentence report was considered by the Court.

The Court asked the Defendant if he/she had anything to say as to why the sentence of law should not be imposed against him/her, and \_\_\_\_\_ the Defendant had nothing to say, or \_\_\_\_\_ the Defendant had his/her say (see transcript of proceedings).

**Imposition of Sentence**

**Based on the foregoing, it is hereby ORDERED AND ADJUDGED AS FOLLOWS:**

☐ **(Straight: Jail)** It is the **Order** of this Court that the defendant is sentenced to \_\_\_\_ years \_\_\_\_ months incarceration in the county jail, under the supervision of the County Sheriff. [\_\_\_\_ hard labor]

☐ **(Straight: Prison)** It is the **Order** of this Court that the defendant is sentenced to \_\_\_\_ years \_\_\_\_ months, or \_\_\_\_ for life, or \_\_\_\_ for life without the possibility of parole, to serve in the penitentiary.

☐ **(Straight: CC\*)** Pursuant to the Alabama Community Punishment and Corrections Act, Ala. Code § 15-18-170 et seq., it is the **Order** of this Court that the defendant is sentenced to \_\_\_\_ years \_\_\_\_ months with \_\_\_\_ years \_\_\_\_ months under the supervision of the \_\_\_\_\_ community corrections program and with the balance suspended.

☐ **(Straight: Prob)** It is the **Order** of this Court that the defendant is sentenced to \_\_\_\_ years \_\_\_\_ months with \_\_\_\_ years \_\_\_\_ months under the supervision of the State Probation Office and with the balance suspended.

**NOTE: Included with this Order is a Probation Order containing general conditions of probation; special conditions of probation appear below.**

☐ **(Split: Jail/Prob)** It is the **Order** of this Court that the defendant is sentenced to \_\_\_\_ years \_\_\_\_ months, split, with \_\_\_\_ years \_\_\_\_ months to serve in the county jail followed by \_\_\_\_ years \_\_\_\_ months under the supervision of the State Probation Office and with the balance suspended.

☐ **(Split: Jail/CC\*)** It is the **Order** of this Court that the defendant is sentenced to \_\_\_\_ years \_\_\_\_ months, split, with \_\_\_\_ years \_\_\_\_ months to serve in the county jail followed by \_\_\_\_ years \_\_\_\_ months under the supervision of the \_\_\_\_\_ community corrections program.

☐ **(Split: Prison/Prob)** It is the **Order** of this Court that the defendant is sentenced to \_\_\_\_ years \_\_\_\_ months, split, with \_\_\_\_ years \_\_\_\_ months to serve in the penitentiary followed by \_\_\_\_ years \_\_\_\_ months under the supervision of the State Probation Office and with the balance suspended.

- ☐ **(Reverse Split: Prison/Prob)** It is the **Order** of this Court that the defendant is sentenced to \_\_\_\_ years \_\_\_\_ months, split, with \_\_\_\_ years \_\_\_\_ months to serve in the penitentiary. Sentence is suspended, and the defendant is placed on supervised probation for a period of \_\_\_\_ years \_\_\_\_ months under the supervision of the State Probation Office. Upon completion of said probation period, the defendant shall serve a period of \_\_\_\_ years \_\_\_\_ months in the custody of \_\_\_\_ Department of Corrections or \_\_\_\_ County Sheriff.
- ☐ **(Boot Camp)** Defendant shall serve up to 180 days in the custody of the Commissioner of the Department of Corrections and shall successfully complete the disciplinary, Rehabilitation program. When said program is completed or defendant is released from said program, he shall be returned to this Court for a hearing on his application for probation.
- ☐ **(Split: CC\*/Prob)** Pursuant to the Alabama Community Punishment and Corrections Act, Ala. Code § 15-18-170 et seq., it is the **Order** of this Court that the defendant is sentenced to \_\_\_\_ years \_\_\_\_ months, split, with \_\_\_\_ years \_\_\_\_ months to serve under the supervision of the \_\_\_\_ Community Corrections Program followed by \_\_\_\_ years \_\_\_\_ months under the supervision of the State Probation Office and with the balance suspended.
- ☐ **(Split: Prison/CC\*/Prob)** Pursuant to the Alabama Community Punishment and Corrections Act, Ala. Code § 15-18-170 et seq., it is the **Order** of this Court that the defendant is sentenced to \_\_\_\_ years \_\_\_\_ months, split, with \_\_\_\_ years \_\_\_\_ months to serve in the penitentiary followed by \_\_\_\_ years \_\_\_\_ months to serve under the supervision of the \_\_\_\_ Community Corrections Program, followed by \_\_\_\_ years \_\_\_\_ months under the supervision of the State Probation Office and with the balance suspended.
- ☐ Sentence includes Enhancements under the Habitual Felony offender Statute, §13A-5-9, *Code of Alabama* 1975.
- ☐ Sentence includes five (5) year enhancement for sale of drug within 3 miles of school campus pursuant to §13A-12-250, *Code of Alabama* 1975.
- ☐ Sentence includes five (5) year enhancement for sale of drug within 3 miles of housing project pursuant to §13A-12-270, *Code of Alabama* 1975.
- ☐ Sentence includes Firearm or Deadly Weapon Enhancements pursuant to §13A-5-6, *Code of Alabama* 1975.
- ☐ Sentence includes other enhancements of \_\_\_\_\_.
- ☐ Sentence is to run concurrent with \_\_\_\_\_.

\* **EXCLUDED OFFENSES – Offenses excluded by law from Community Corrections sentencing:** Murder; 1<sup>st</sup> Deg. Kidnapping; 1<sup>st</sup> Deg. Rape; 1<sup>st</sup> Deg. Sodomy; 1<sup>st</sup> Deg. Arson; Selling/Trafficking in Controlled Substances; 1<sup>st</sup> Deg. Robbery; 1<sup>st</sup> Deg. Sexual Abuse; Forcible Sex Crimes; Lewd & Lascivious Acts Upon a Child; and 1<sup>st</sup> Deg. Assault if Victim Permanently Disfigured or Disabled (Ala. Code § 15-18-171 (14)).

### Voluntary Sentencing Standards

The Voluntary Sentencing Standards have been considered and ☐ followed ☐ not followed

Sentencing Standards' Recommendation is: ☐ Non-Prison ☐ Prison

Sentencing Range – Straight sentence: \_\_\_\_ months to \_\_\_\_ months

Sentencing Range – Split sentence: \_\_\_\_ months to \_\_\_\_ months (total) **AND** \_\_\_\_ months to \_\_\_\_ months (to serve)

\_\_\_\_\_ The Defendant shall perform \_\_\_\_\_ hours of community service.

\_\_\_\_\_ The Defendant shall enroll in, cooperate fully with and successfully complete, and file proof of completion with the Court Clerk, all the following marked programs:

_____ Substance Abuse Assessment and Treatment	_____ Mental Health Evaluation/Treatment
_____ Sex Offender Evaluation/Treatment	_____ Domestic Violence Education
_____ Anger Management Education	_____ Parenting Skills
_____ Life Skills	_____ Other _____

\_\_\_\_\_ The Defendant is fined the sum of \$ \_\_\_\_\_.

\_\_\_\_\_ The Defendant shall reimburse the State of Alabama the costs of his/her appointed attorney.

\_\_\_\_\_ The Defendant shall pay the costs of court as determined by the Clerk's office.

\_\_\_\_\_ The Defendant shall pay the Alabama Crime Victim's Compensation Fund the sum of \$ \_\_\_\_\_.

\_\_\_\_\_ The Defendant shall pay restitution in the amount of \$ \_\_\_\_\_ to \_\_\_\_\_.

\_\_\_\_\_ Since this is a drug related offense, the Defendant shall pay an additional fine of \_\_\_\_\_ \$1,000 (first offense) or \_\_\_\_\_ \$2,000 (second offense), pursuant to the Drug Demand Reduction Assessment Act, §13A-12-281, *Code of Alabama (1975)*.

\_\_\_\_\_ Since this is a drug related offense, the Defendant is ordered to surrender his/her driver's license, and have all driving privileges suspended for a term of six (6) months, pursuant to §13A-12-90.

\_\_\_\_\_ Since this is a drug related offense, the Defendant shall pay an additional fine of \$100.00 to the Alabama Department of Forensic Sciences, pursuant to §36-18-7, *Code of Alabama (1975)*.

\_\_\_\_\_ The Defendant shall commence payment of fines, fees, costs and restitution in at least partial payment(s) on \_\_\_\_\_.

\_\_\_\_\_ The Clerk's office is directed to pay out all monies received in this case toward the payment of court costs and fines. Once court costs and fines have been fully satisfied, then monies should be directed toward payment of restitution and all other costs.

\_\_\_\_\_ The payment of all court ordered monies shall be a condition of parole, Community Corrections, S.I.R., work release, and/or probation.

\_\_\_\_\_ The Defendant shall submit to the taking of DNA samples.

\_\_\_\_\_ The Defendant shall register as a sex offender.

\_\_\_\_\_ The Defendant is given credit for time served.

\_\_\_\_\_ The Defendant was advised of the right to appeal his/her conviction and/or sentence and, if indigent, advised of the right to appointed counsel and to have the court reporter's transcript provided without cost to the Defendant.

**Defendant shall abide by all lawful conditions, rules, regulations and directives of his/her supervising agency (Community Corrections, or Probation). The conditions, rules, regulations and directives of Defendant's supervising agency are hereby incorporated by reference into this Order. Any violation of any such conditions, rules, regulations or directives shall be a violation of this Order and may serve as a basis for revocation of the sentence stated herein.**

Other special conditions **Ordered** by the Court are as follows:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**So Ordered** this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_.

\_\_\_\_\_  
Judge





## **V. Crime Victim Assessment and Restitution**

### *Victim Restitution*

In any case in which a defendant is convicted of criminal activity resulting in pecuniary damages or loss to a victim, the court is required to conduct a restitution hearing and order the defendant to “make restitution or otherwise compensate such victim for any pecuniary damages.” Section 15-18-67, *Code of Alabama* 1975. In determining the manner, method or amount of restitution to be ordered, the court is encouraged to take into consideration:

- (1) The financial resources of the defendant and the victim and the burden that the manner or method of restitution will impose upon the victim or the defendant;
- (2) The ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;
- (3) The anticipated rehabilitative effect on the defendant regarding the manner of restitution or the method of payment;
- (4) Any burden or hardship upon the victim as a direct or indirect result of the defendant’s criminal acts;
- (5) The mental, physical and financial well being of the victim. Section 15-18-68, *Code of Alabama* 1975

### *Mandatory Crime Victim Compensation Assessment*

Pursuant to Section 15-23-17, *Code of Alabama* 1975, a victim compensation fee in the amount of not less than \$50 and no more than \$10,000 shall be assessed against any person convicted or pleading guilty to a felony and “[i]n imposing this penalty, the court shall consider factors such as the severity of the crime, the prior criminal record, and the ability of the defendant to pay, as well as the economic impact of the victim compensation assessment on the dependents of the defendant.” Section 15-23-17(b), *Code of Alabama* 1975.



## **VI. HFOA Amendments – Retroactive Application Kirby Motions**

Alabama's Habitual Felony Offender Act was amended, effective May 25, 2000, to provide that a person convicted of a Class A felony after three prior felony convictions, none of which were a Class A felony, could be sentenced to life *or life without* parole and to expand the sentencing options for a defendant with three prior felony convictions who is subsequently convicted of a Class B felony to include an imprisonment term of not less than 20 years or life imprisonment (prior law provided only for life imprisonment). This amendment was only to be applied prospectively. The following year the statute was further amended by Act 2001-977 to provide for the retroactive application of such sentences (life) by the sentencing judge or presiding judge upon the evaluation of non-violent offenders for early parole performed by the Department of Correction and approved by the Board of Paroles.

By Executive Order #62, the Governor ordered the Department of Corrections (DOC) to establish a procedure for the evaluation of non-violent offenders and submit its proposal on June 1, 2002, to the Attorney General and the Sentencing Commission for their recommendations and comments. Based on this Executive Order, implementation of Act 2001- 977 would be considered for approval by the Governor after the Sentencing Commission and Attorney General reviewed the proposal prepared by DOC and provided their input.

Numerous attempts were made to clarify the procedures that should be followed for retroactive implementation of the 2000 amendments to the Habitual Felony Offender Act. There were many meetings held between representatives from the Department of Corrections, Sentencing Commission, Board of Pardons and Paroles, Office of Prosecution Services and the Attorney General's office. These meetings did not result in agreement regarding the proper definition to apply to determine who was a "non-violent offender" under the Act's provisions, and raised more questions about the Act's implementation and the Act's constitutionality. Clarification was sought during the 2003 Legislative Session Representative Demetrius Newton introduced HB 523 on 4/8/03 and Representative Brewbaker, along with D. Newton introduced HB 744 on 5/15/03 Neither of these bills passed. During the 2004 Regular Session Demetrius Newton introduced HB 365 and Representative Brewbaker introduced HB 61, neither of which passed.

In the case of *State of Alabama v. Junior Mack Kirby*, CC-1989-252, the Circuit Court of Jackson County held Act 2001-977 unconstitutional on the grounds it constitutes an unlawful delegation of legislative power in violation of the separation of powers doctrine. In issuing its ruling, the Court invited the Legislature to revisit this issue utilizing the work done by DOC and the Sentencing Commission on who should be considered violent and nonviolent. The Supreme Court granted Certiorari in this case, and in an opinion issued August 27, 2004, *Ex parte Kirby*, 899 So.2d 968 Ala.2004), reversed the Court of Criminal Appeals' order dismissing the appeal and held that there should be no further delay of the retroactive application of the 2000 amendment to § 13A-5-9 to allow trial courts to modify the sentences of those eligible inmates formerly sentenced under the HFOA.

Staff of the Administrative Office of Courts, Department of Corrections, Pardons and Paroles met on Friday, September 24<sup>th</sup> and discussed possible procedures and a form petition which will be submitted to the Supreme Court's Standing Committee on the Rules of Criminal Procedure for their consideration.

The Criminal Rules Committee (Chaired by former Presiding Judge of the Court of Criminal Appeals, Bill Bowen), met to consider the Kirby Opinion and proposed procedures for implementation on Tuesday November 23, 2004, following issuance of the Certificate of Judgment by the Supreme Court on October 22, 2004. The majority of the committee members voted not to recommend a rule of procedure to govern motions or petitions to modify sentences pursuant to Act 2001-977 and the Kirby Opinion.

During the 2007 Regular Session, the Legislature passed House Bill 223, enacted as Act 2007-457, effective June 14, 2007. This Act amended § 13A-5-9.1 of the *Code of Alabama 1975*, relating to the resentencing of nonviolent offenders sentenced under the Habitual Offender Act, to provide that where the original sentencing judge is no longer in office, the presiding circuit judge may appoint any circuit judge to consider a *Kirby* petition for resentencing of each nonviolent convicted offender based on evaluations performed by the Department of Corrections and approved by the Board of Pardons and Paroles and submitted to the court.

### HABITUAL FELONY OFFENDER ACT - § 13A-5-9 (as amended)

Prior Felonies This Offense	NO Prior Felonies	One Prior Felony	Two Prior Felonies	Three Prior Felonies
<b>Class A Felony</b> <b><u>(No prior conviction for a Class A Felony)</u></b>	10-99 Years or Life In State Penitentiary Fine up to \$20,000	15-99 Years or Life In State Penitentiary (Fine up to \$20,000)	Life Imprisonment or Any Term of Years Not Less than 99 years (Fine up to \$20,000)	Mandatory <u>Imprisonment for</u> <u>Life or Life</u> Imprisonment Without Possibility of Parole (Fine up to \$20,000)
<b>Class A Felony</b> <b>(One or more prior convictions for any Class A Felony)</b>	10-99 Years or Life in State Penitentiary Fine up to \$20,000	15-99 Years or Life in State Penitentiary (Fine up to \$20,000)	Life Imprisonment or Any Term of Years Not Less than 99 Years (Fine up to \$20,000)	Mandatory Imprisonment For Life Without Possibility of Parole (Fine Up to \$20,000)
<b>Class B Felony</b>	2-20 Years In State Penitentiary Fine up to \$10,000	10-99 Years or Life In State Penitentiary Fine up to \$20,000	15-99 Years or Life In State Penitentiary (Fine up to \$20,000)	<u>Minimum of not less</u> <u>than 20 years or</u> Life Imprisonment (Fine up to \$20,000)
<b>Class C Felony</b>	1 Year & 1 day - 10 Years In State Penitentiary Fine Up to \$5,000	2-20 Years In State Penitentiary Fine up to \$10,000	10-99 Years or Life In State Penitentiary Fine up to \$20,000	15-99 Years or Life In State Penitentiary (Fine up to \$20,000)

As amended by Act 2000-759 and Act 2001-977

*Underlining represents amended language.*

#### § 13A-5-9. Habitual felony offenders -- Additional penalties.

(a) In all cases when it is shown that a criminal defendant has been previously convicted of a felony and after the conviction has committed another felony, he or she must be punished as follows:

- (1) On conviction of a Class C felony, he or she must be punished for a Class B felony.
- (2) On conviction of a Class B felony, he or she must be punished for a Class A felony.
- (3) On conviction of a Class A felony, he or she must be punished by imprisonment for life or for any term of not more than 99 years but not less than 15 years.

(b) In all cases when it is shown that a criminal defendant has been previously convicted of any two felonies and after such convictions has committed another felony, he or she must be punished as follows:

- (1) On conviction of a Class C felony, he or she must be punished for a Class A felony.
- (2) On conviction of a Class B felony, he or she must be punished by imprisonment for life or for any term of not more than 99 years but not less than 15 years.
- (3) On conviction of a Class A felony, he or she must be punished by imprisonment for life or for any term of not less than 99 years.

(c) In all cases when it is shown that a criminal defendant has been previously convicted of any three felonies and after such convictions has committed another felony, he or she must be punished as follows:

(1) On conviction of a Class C felony, he or she must be punished by imprisonment for life or for any term of not more than 99 years but not less than 15 years.

(2) On conviction of a Class B felony, he or she must be punished by imprisonment for life or any term of not less than 20 years.

(3) On conviction of a Class A felony, where the defendant has no prior convictions for any Class A felony, he or she must be punished by imprisonment for life or life without the possibility of parole, in the discretion of the trial court.

(4) On conviction of a Class A felony, where the defendant has one or more prior convictions for any Class A felony, he or she must be punished by imprisonment for life without the possibility of parole.

(Acts 1977, No. 607, p. 812, § 1235; Acts 1979, No. 79-664, p. 1163, § 1; Act 2000-759.

#### **§ 13A-5-9.1. Retroactive application of Section 13A-5-9.**

The provisions of Section 13A-5-9 shall be applied retroactively by the sentencing judge or presiding judge for consideration of early parole of each nonviolent convicted offender based on evaluations performed by the Department of Corrections and approved by the Board of Pardons and Paroles and submitted to the court.

(Act 2001-977, 3rd Sp. Sess., p. 941, § 1.)

**Motion For Sentence Modification**  
**Pursuant to Act 2001-977 §13A-5-9.1**  
*(please print)*

Defendant \_\_\_\_\_ Case No. \_\_\_\_\_

Inmate AIS# \_\_\_\_\_ Sentence \_\_\_\_\_

County of Conviction \_\_\_\_\_ Sentencing Judge \_\_\_\_\_

Date of Sentence \_\_\_\_\_ Date of Admission \_\_\_\_\_

Comes now the defendant in the above styled case and petitions the court to reconsider the sentence previously imposed under Alabama's habitual felony offender statute, as amended by Act 2000-759, Act 2001-977, and pursuant to the Alabama Supreme Court's holding in Ex parte Kirby, 899 So.2d 968 (Ala. 2004). *I swear and affirm that the following facts are true and correct*

Last (Current) Conviction Offense \_\_\_\_\_

Most Serious Conviction Offense \_\_\_\_\_

Date Sentenced Under the Habitual Felony Offender Statute \_\_\_\_\_

**(Must be prior to 5/26/2000)**

*I swear and affirm that:*

☐ I am currently serving a prison sentence of "Life without the possibility of parole," having been convicted of Class A Felony and sentenced under the Habitual Felony Offender Act, prior to its amendment by Act 2000-759(effective 5/25/2000), and that none of my prior convictions were for a Class

A felony.

***OR***

☐ I am currently serving a prison sentence of "Life imprisonment," having been convicted of a Class B Felony and sentenced under the Habitual Felony Offender Act, prior to its amendment by Act 2000-759 (effective 5/25/2000).

List all prior adult felony convictions, including out-of-state convictions (must be three or more)

1. Crime \_\_\_\_\_ Date \_\_\_\_\_ Place of Conviction \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_

Sworn to and subscribed before me,

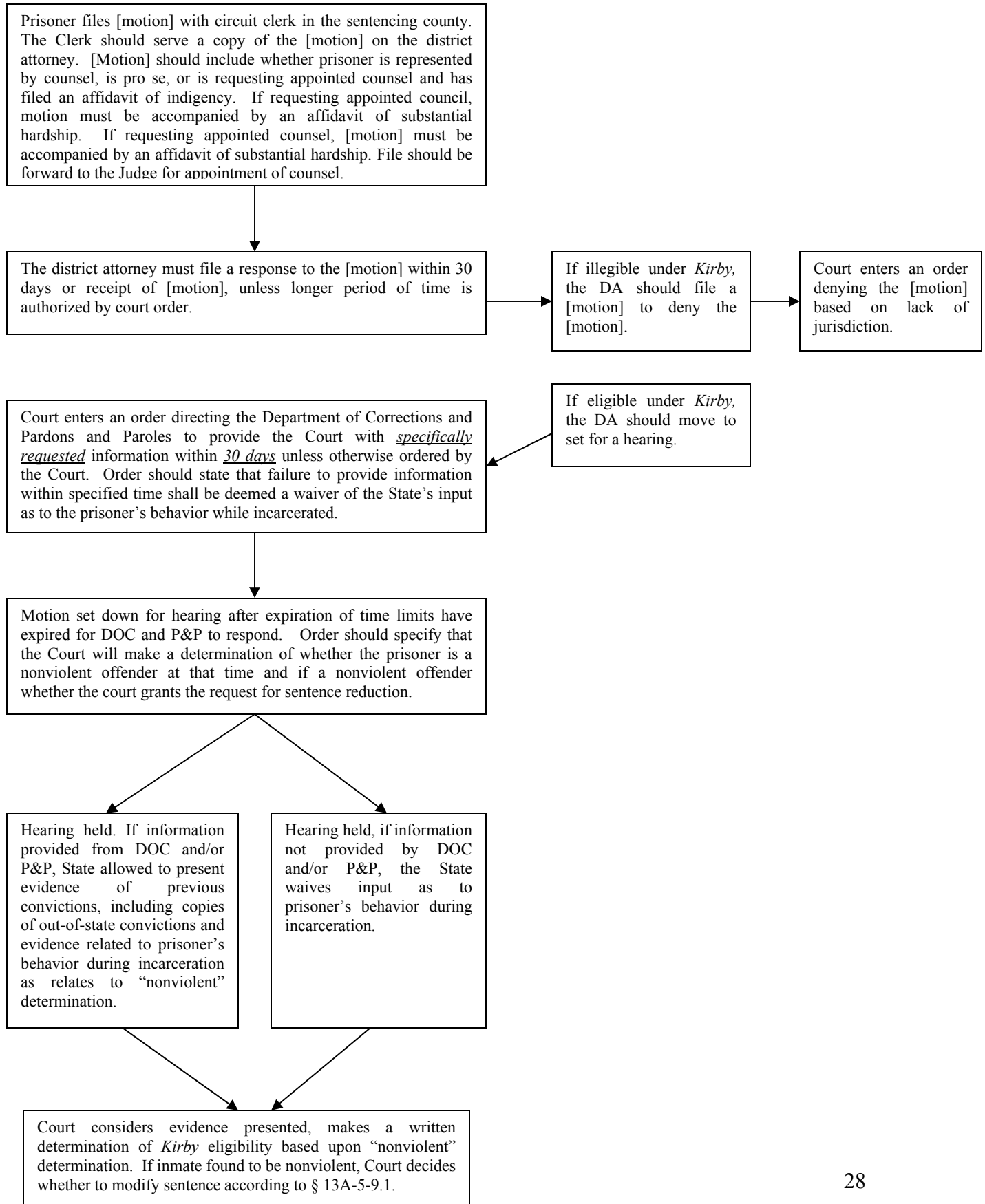
\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Signature of Defendant

\_\_\_\_\_  
Date



# Proposed Procedures Chart



**IN THE CIRCUIT COURT OF \*\*\*\*\*COUNTY, ALABAMA**

<b>Paul Prisoner, AIS # 234789</b>	)	
	)	
	)	
<b>v.</b>	)	<b>CC-2001-0756-X</b>
	)	
	)	
	)	
<b>State of Alabama</b>	)	

This cause being before this Court upon [motion] of Paul Prisoner seeking resentencing pursuant to *Ex parte Kirby*, 899 So.2d 968 (Ala. 2004) and Ala. Code §§ 13A-5-9 and 9.1 which allow certain convicted offenders to be resentenced retroactively. The Alabama Supreme Court vested in the sentencing court the authority to make the determination of whether an inmate is eligible for consideration for resentencing. The Court specifically referred to the inmate's conduct while incarcerated and that such knowledge was within the purview of the Department of Corrections. Further, the Court included information submitted (to the trial court) by the Parole Board as among the factors to be considered.

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convictions including offense, date and sentence received, (7) number, if any of probation or parole revocations, (8) number, if any of escapes or attempted escapes, (9) all disciplinaries and the specific rule violations which resulted in such disciplinaries and a factual accounting of each violation, (10) any new offenses committed while in DOC custody, (11) a copy of any evaluation of the inmate's conduct conducted by the Department of Corrections pursuant to Ala. Code §13A-5-9.1.

In accordance with *Ex parte Kirby*, supra, the failure of either the Department of Corrections or the Board of Pardons and Paroles to provide such requested information to this Court shall be deemed as a waiver to any input as to the inmate's conduct while incarcerated.

The Clerk shall serve a copy of this order upon Paul Prisoner, the Department of Corrections, the Board of Pardons and Paroles, and the District Attorney of the 00<sup>th</sup> Circuit.

DONE AND ORDERED THIS \_\_\_\_\_ day of \_\_\_\_\_, 2004 at Anytown, Any County, Alabama.

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Circuit Judge

**Sample Kirby DOC Production Order**

**IN THE CIRCUIT COURT OF SOME COUNTY,  
ALABAMA**

<b>STATE OF ALABAMA,</b>	)	
	)	
<b>Plaintiff</b>	)	
<b>v.</b>	)	
<b>John Doe ,</b>	)	<b>CASE NO: CC 94-1161</b>
<b>Defendant.</b>	)	

**ORDER**

The Defendant has filed a Motion entitled "Motion for Reconsideration of Sentence" dated October 13, 2004. In support of said Motion the Defendant cites Section 13A-5-9.1 and the case of *Ex Parte Kirby*, 899 So.2d 968 (Ala.2004). The *Kirby* decision allows the retroactive application Section 13A-5-9 and the Legislature vested jurisdiction in the sentencing judge or presiding judge to reopen a case more than thirty (30) days after sentencing. However, the Court's decision is only applicable to a narrowly defined group of inmates. The inmates that meet the criteria are as follows:

1. Those who were sentenced under the Habitual Offender Act;
2. Sentencing prior to May 26, 2000;
3. Who were currently serving either a sentence of Life without the possibility of Parole and none of the prior convictions used for enhancement purposes were Class A felonies ...
4. Who were determined, by the sentencing or presiding Judge to be a non-violent offender.

According to *Kirby*, the first three elements would apply to Doe. Furthermore, according to *Kirby* to help aid in determining if the Defendant is a non-violent offender, "the Court should consider the inmate's conduct while incarcerated." Defendant Doe fits the

first three items of the criteria. Therefore, the Department of Corrections is ordered to provide to this Court information that would aid this Court in determining whether or not the Defendant is a non-violent offender.'

Specifically, the Department of Corrections is to provide to the Court any disciplinary sanctions received by the Defendant while incarcerated and any reports regarding those underlying citations. The Department of Corrections is to provide this information to the Court within forty-five (45) days from the date of this Order. The Court reserves ruling on the other Motions filed by the Defendant until after the Court has received the information from the Department of Corrections.

The Clerk of the Court is ordered to mail by ordinary mail or deliver a copy of this Order as follows:

Mr. John Doe #148206  
W. E. Donaldson Facility  
100 Warrior Lane Bessemer, AL 35023

Hon. Sam Smith  
District Attorney  
Post Office Box 78

Montgomery, AL 35101-0078

Hon. Charles Crook  
Department of Corrections  
101 South Union Street  
Montgomery, AL 3610

DONE this the 5<sup>th</sup> day of November, 2005.

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Circuit Judge

From reading Kirby, the Defendant's prison record is not the only factor in determining whether or not the Defendant is non-violent. The Court is also, according to Kirby to look to the nature of the Defendant's underlying conviction, other factors brought before the *Judge* in the record of the case, and information submitted to the Judge by the Department of Corrections and Parole Board concerning the inmate's behavior while incarcerated

## Sample Kirby Denial Order

### IN THE CIRCUIT COURT OF ANY COUNTY, ALABAMA

STATE OF ALABAMA

CC-

v.

\_\_\_\_ JOHN DOE

The Defendant has filed a Petition seeking to modify his sentence previously imposed under the Habitual Offender law in Case No. CC-93-\_\_ and enhanced or added to by the revocation proceeding in Case No. CC-89-\_\_ Case No. CC-93-\_\_ was a conviction of Resisting Arrest where the judge imposed a 30 day sentence to run concurrent with the sentence in CC-93-\_\_ and presumably that sentence is disposed for all practical purposes. The Defendant was originally convicted in CC-89-\_\_ and in 1990 sentenced to a split sentence of 15 years with a confinement term of 2 years as a first condition of probation. After he committed the 1993 offense the Defendant's probation was revoked in CC-89-\_\_ and he was directed to serve the balance of the 15 year sentence. The Defendant in CC-93-\_\_ was sentenced to 10 years in the penitentiary, consecutive to the sentence in CC-89-\_\_\_. All of this resulted in the Defendant facing a 25 year penitentiary sentence on these two cases, less the time served on the earlier split sentence and any pre-revocation or new pretrial confinement. The modification sought by the Defendant appears to be on the basis of the change to the Habitual Offender Act brought on by the Amendments to Section 13A-5-9 Code of Alabama 1975, as made retroactive by Section 13A-5-9.1, The changes to the Habitual Offender Act only effect an opportunity to those inmates or Defendants who were originally sentenced to a Class B felony as a Habitual Offender with three prior felony convictions to "life" in the penitentiary, and to those inmates or Defendants who were originally sentenced to a Class A felony as a Habitual Offender with three prior felony convictions to "life without possibility of parole." These two classes of inmates, if they are determined to be non-violent inmates, could have their sentences reduced from "life" to "not less than 20 years," or from "life without possibility of parole" to "life." The Defendant does not fit in either of those categories and hence his Petition is without merit. Based on the *foregoing*, it is **ORDERED, ADJUDGED and DECREED** that the Defendant's Petition for Relief from Conviction or Sentence be and the same is hereby denied. DONE this the \_\_ day of \_\_\_\_\_, 2004 At Some town, Alabama.

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Circuit Judge



## **VII. Child Sex Offender Act**

### **New Offenses- More Severe Penalties**

#### **(1) § 13A-5-2(d)**

Prohibits persons convicted of child sex offenses as defined by Act (victims under 12) and child pornography offenses (children under 17) from receiving probation. Includes Class A, B and C felonies, as well as misdemeanors i.e., sexual abuse 2<sup>nd</sup>, any crime involving lewd and lascivious conduct. Appears to conflict with amendments to the split sentencing statute which only prohibits defendants charged with Class A and B felony child sex offenses from being sentenced under the split sentencing statute, which requires that a portion of the sentence be served on probation.

#### **(2) Mandatory Minimum – Class A child sex offenders § 13A-5-6**

- Class A - Not less than 20 years incarceration (additional 10 years)
- Class B - Not less than 10 years incarceration (additional 8 years)

**(3) 10 years post-release supervision** must be imposed as an additional penalty on any defendant convicted of a Class A felony criminal sex offense involving a child (including pornography offenses) and any offender designated as a sexually violent predator.

§ 13A-5-6 (c)

#### **(4) Enticing Child into vehicle, etc. § 13A-6-69**

Punishment for first offense increased from maximum of 5 years to 10 years. Provision for enhanced penalty was eliminated; under prior statute second conviction was punishable by imprisonment for not less than 2 nor more than 10 years and the person was not eligible for probation. As amended, a violation of this section is punishable as a Class C felony (1 year and a day up to 10 years).

#### **(5) Failure/Refusal to Register § 13A-11-200**

- Decreases time in which a sexual offender (not juvenile delinquents) must register his residence following release from custody or upon moving from 30 to 7 days.
- Adds pleas of nolo contendere as convictions, even where adjudication withheld
- Makes it a Class C felony to fail or refuse to register residence. Previously punishable by imprisonment not less than one year nor more than five years. Increased authorized penalty by five years imprisonment.

#### **(6) No good time for any child sex offenders § 14-9-41.**

Includes all degrees and pornography offenses. Was previously withheld for Class A felons, defendants sentenced to life or death or those receiving a sentence of more than 15 years and splits during minimum confinement period.

#### **(7) Split Sentence/Probation Prohibited § 15-18-8**

Amends split sentencing statute to prohibit defendants convicted of a Class A or B felony child sex offense from receiving a split sentence. Class C felony child sex offenders may receive a split sentence.



**Prohibits Class A or B child sex offenders from receiving probation.** Although other provisions of the Act amending the Criminal Code may appear to prohibit probation for all sex offenders, this statute excludes only A and B child sex offenders and provides, “Otherwise, probation may be granted whether the offense is punishable by fine or imprisonment or both.”

**(8) Defines “Adult Criminal Sex offender” § 15-20-21** to include a person who has pleaded **nolo contendere** to a criminal sex offense, regardless of whether adjudication was withheld.

**(9) Community Notification Act § 15-20-21**

Amends this section to include a catchall provision for other crimes – “Any crime committed in any jurisdiction which, irrespective of the specific description or statutory elements thereof, is in any way characterized or known as rape, sodomy, sexual assault, sexual battery, sexual abuse, sexual torture, solicitation of a child, enticing or luring a child, child pornography, lewd and lascivious conduct, taking indecent liberties with a child, or molestation of a child.”

**Adds term “Criminal Sex Offense Involving a Child,”** defined as “a conviction for any criminal sex offense in which the victim was a child under the age of 12 and any offense involving child pornography (which apply to children under 17).”

**Amends definition to employment** to “include any full-time or part-time employment for any period, whether financially compensated, volunteered, or for purposes of government or educational benefit.” Prior statute had exception for short periods of part-time employment.

**(10) Requirements Prior to Release § 15-20-22**

Increases time prior to release from 30 to 45 days for responsible agency to notify Public Safety of the inmates address upon release. Added requirement for name and physical address of employer.

**More Severe Punishment for Untimely/Inaccurate Declarations**

Failure to provide timely and accurate declarations increased from a Class A misdemeanor to a Class C felony.

**Notification Violations**

Adult criminal sex offenders in violation are not eligible for probation or parole and those who are due to EOS can only be released on bond and as a condition comply with notification provisions.

Adds notification for offender intending to “be employed outside of the state” and requires notification by responsible agency to DPS, AG, CJIC and law enforcement of other state within 5 business days of declarations. Also provides for notification for sex offenders intending to “reside, live, or be employed within

this state.” Prior to changes pursuant to Act 2005-301, the notification requirements only referred to *residing* outside or within the state.

**New Offense – Failure to Advise of Employment - Class C Felony**

Adds a provision for offenders that do not have employment upon release – Upon obtaining employment requires declaration to Sheriff and Police Chief where employed by the end of the next business day after obtaining employment. Establishes new offense – Class C felony, for failure to timely advise of employment.

**(11) Notification – Change of Residence – More Severe Penalty § 15-20-23**

Omits reference to “legal” residence, omits reference to “intentional” failure to notify, and increases penalty for failing to provide a timely and accurate written declaration from a Class A misdemeanor to a Class C felony.

**Failure to submit notice of intent of change of employment – Class C felony**

**§ 15-20.23.1**

Provides that offender will be deemed to establish a new residence in any of the following situations: 1) when he is domiciled for 3 or more consecutive days (was 5 days); 2) whenever he is domiciled following his release or 3) <sup>NEW PROVISION</sup> whenever he spends 10 or more aggregate days at a location during a calendar month.

**(12) Periodic Verification of Residence § 15-20-24**

Amends this statute to require any adult criminal sex offender to report in person to the sheriff or chief of police within 60 days of his or her most recent release, thereafter each year within 30 days of the offender’s birthday and every 6 months following his birthday. (Check reference on page 31, line 12 regarding reference to “within 90 days of his or her most recent release.”)

**New Offense – False Statements**

Provides that any adult criminal sex offender who fails to comply with verification process or provides a false statement to law enforcement in the verification process, or knowingly fails to permit law enforcement personnel to obtain fingerprints or photograph is guilty of a Class C felony. The provision regarding false statements creates new offense.

**(13) Registration by Non-Resident Workers and Students § 15-20-25.1**

Increases penalty for intentional failure to provide timely and accurate written declaration from a Class A misdemeanor to a Class C felony.

**(14) Notice of Employment, Enrollment at institution of higher education**

**§ 15-20-25.2**

References to “school” omitted, now refers to “institution of higher education”. Increases penalty for intentional failure to provide timely and accurate written declaration from a Class A misdemeanor to a Class C felony.

**(15) Sexually Violent Predator § 15-20-25.3**

Provides that a sexually violent predatory must undergo electronic monitor for no less than 10 years after his release from incarceration. This requirement shall be a part of the predator's sentence.

**(16) Prohibited Residence Locations § 15-20-26**

Prohibits adult criminal sex offenders who are parents, grandparents or stepparents of the minor from residing with a minor if: 1) parental rights have been or are being terminated; 2) offender has been convicted of any criminal sex offense involving his children, grandchildren or stepchildren; 3) the offender has been convicted of a sex offense in which a minor was the victim and the minor resided or lived with the offender at the time of the offense; and 4) NEW the adult sex offender has ever been convicted of any sex offense involving a child, regardless of whether he was related to or shared a residence with the child victim.

**New offense of loitering within 500 feet provided - Class C felony**

New offense of carrying on employment or vocation within 500 feet of school, child care facility, playground, park, athletic field or facility or any other business or facility having a principal purpose of caring for, educating, or entertaining minors. Class C felony.

**Juvenile Sex Offenders – Requirements prior to Release § 15-20-29**

The only substantive change is in subsection (c) relating to community notification. It was amended to provide “community notification, however, shall not be allowed, unless so ordered by the sentencing court.” It appears that this was a correction in the existing law.

**(17) § 15-20-31** Requires the sentencing court to order sex offending youths that are treated as a juvenile criminal sex offenders under the Act to undergo sex offender treatment and a risk assessment prior to release. Note problems mentioned earlier with finding approved treatment providers.

**(18) CJIC Electronic Monitoring § 15-20-26.1**

Specifically provides that electronic monitoring may be a condition of parole, probation, community corrections, CRO supervision, pretrial release, or any other community based punishment option for any criminal sex offender.

Subsection (d) requires Class A felony child sex offenders to undergo no less than 10 years of electronic monitoring upon release, as a part of their sentence (includes Class A pornography offenses).

Driver's License- § 15-20.26.2 Failure to have valid driver's license or Public Safety ID. Class C Felony.

**(19) Abolition of Parole § 15-22-27.3**

Prohibits parole of any person convicted of a Class A or B felony sex offense involving a child.

**(20) Bid Law**

Requires that procurement of product or services for compliance with the Act, specifically electronic monitoring, equipment, etc. to comply with the competitive bid process.

**Juveniles and Youthful Offenders - Statutory Rape Exemption**

Note that § 15-20-21(4) of the Community Notification Act, listing the offenses that are included, under subsection (a) specifying the crimes of rape 1<sup>st</sup> and 2<sup>nd</sup> expressly provides, “provided that a sentencing court may exempt from this article a juvenile or youthful offender criminal sex offender for a criminal sex offense as defined in Section 13A-6-62(a)(1) [statutory rape].” The Administrative Office of Courts is requesting clarification on the application of the new sex offender laws to juvenile and youthful offender adjudications.



## VIII. Good Time and Parole

### Alabama's Good Time Laws and Discretionary Parole Practices Produce Uncertainty In Sentencing

In Alabama, the release date for most inmates is determined not by the judge, but rather, based on the amount of “good time” awarded and the release decisions left to the discretion of a 3-member parole board. “Good time” credits, like parole, directly affect the length of time a prisoner spends behind bars, altering the sentence handed down by the trial judge. Alabama has the distinction of having one of the most generous good time laws, with prisoners receiving two and one-half days for every day served.

In practice, good time credits are not “earned.” The grant of credits does not depend on an inmate’s participation in prison programs, work time or outstanding service, but rather, are automatically calculated upon entry into the prison system and are only denied or forfeited for bad conduct or rule violations. These credits are considered to be an entitlement and any forfeiture or denial, punishment. The average inmate serving a sentence of 15 years or less is given 243 days credit for every 365 days served (a total of 608 days per year).

The current system is a complicated four-level structure that takes into account various factors such as: the applicable earning class, disciplinary infractions, type of sentence, the crime of conviction, and whether multiple terms are being served concurrently or consecutively. The system then uses these factors to calculate sentence good time deductions.

Although the Correctional Incentive Time laws (CIT), §§ 14-9-40, et seq., applies to most inmates (those committing crimes on or after May 19, 1980), statutory good time and incentive good time statutes are still applicable to prisoners incarcerated for crimes committed prior to May 19, 1980. Incentive Good Time (IGT) is an additional one-for-one (maximum by statute is 2 days for each day served) reduction in sentence authorized for *inmates serving SGT* who exhibit exceptional behavior and are approved by the proper authorities.

Trial judges should avoid trying to explain good time to a defendant, but should have the defendant acknowledge on the record that his guilty plea is offered without consideration or when or whether he would be entitled to early release.

## **A. Good Conduct Credit – Correctional Incentive Time**

### **1. Offenders Not Entitled To Good Time Credit**

- ☐ Inmates sentenced to life imprisonment or death and inmates convicted of a Class A felony.
- ☐ Inmates receiving a sentence of more than 15 years in the state penitentiary or in the county jail at hard labor.
- ☐ Inmates serving a split sentence, during the minimum term of imprisonment.
- ☐ Defendants sentenced under mandatory enhancement statutes serving sentences not subject to early release provisions. § 14-9-41, *Code of Alabama* 1975.
- ☐ Defendants on probation.
- ☐ Inmates convicted of a criminal sex offense involving a child as defined in §15-20-21(5) (including child pornography applicable to children under 17 years of age).

### **2. Offenders Serving Hard Labor for County or Municipal Jail**

#### **a. Section 14-9-41(a) provides that good time is available**

“ Each prisoner who shall hereafter be convicted of any offense against the laws of the State of Alabama and is confined, in execution of the judgment or sentence upon any conviction, in the penitentiary or at *hard labor for the county or in any municipal jail* for a definite or indeterminate term, other than for life, whose record of conduct shows that he has faithfully observed the rules for a period of time to be specified by this article may be entitled to earn a deduction from the term of his sentence as follows:...”

#### **b. Section 14-9-41(e) Adds Confusion**

“Provided, however, no person may receive the benefits of correctional incentive time if he or she has been convicted of a Class A felony or has been sentenced to life, or death, *or who has received a sentence for more than 15 years in the state penitentiary or in the county jail at hard labor or in any municipal court.* No person may receive the benefits of correctional incentive time if he or she has been convicted of a criminal sex offense involving a child as defined in Section 15-20-21(5)....”

### **3. Minimum Time in Each Class**

Class IV- No Credit	30 days
Class III- 20 days for every 30 served	90 days
Class II- 40 days for every 30 served	180 days
Class I*- 75 days for every 30 served	Remainder of Sentence

\*Inmates convicted of assault where the victim suffered the permanent loss or use or permanent partial loss or use of any bodily organ or appendage or inmates convicted of sexual abuse of a child under the age of 17 cannot be placed in Class I.

### **4. Good Time Deductions are Allowed for Time on Parole. § 14-9-42**

A deduction from a sentence provided for by this article shall be allowed for any time period served on parole. No deduction from a sentence provided in this article shall be used for determining an inmate's eligibility for parole.



**Sentence Served Applying Correctional Incentive Time**  
***Automatic Elevation – No Jail Credit***

<b>Sentence</b>	<b>Year</b>	<b>Month</b>	<b>Day</b>
1 Year	—	6	18
2 Years	—	11	5
3 Years	1	2	18
4 Years	1	6	—
5 Years	1	9	13
6 Years	2	—	26
7 Years	2	4	9
8 Years	2	7	22
9 Years	2	11	5
10 Years § 14-9-41(e)	3	2	18
11 Years	3	6	—
12 Years	3	9	13
13 Years	3	11	28
14 Years	4	4	9
15 Years	4	7	22
16 Years (Consecutive)	4	11	5
17 Years (Consecutive)	5	2	18
18 Years (Consecutive)	5	6	—
19 Years (Consecutive)	5	9	13
20 Years (Consecutive)	6	—	26
25 Years (Consecutive)	7	6	—
30 Years (Consecutive)	8	11	5
40 Years (Consecutive)	11	9	13
50 Years (Consecutive)	14	7	22

## B. Parole Policies Affect Sentence Length

The time actually served on a sentence is also determined by discretionary parole consideration dates that are superimposed on “good time” credits. These dates are determined a number of different ways depending on the length of the sentence, the crime at conviction, and the number of votes required for parole.

For prisoners receiving “good time,” the first date for consideration of parole by majority vote of the Board is determined by the sentence of imprisonment imposed. An inmate *serving five years or less* is placed on the current docket. If the inmate is *serving more than 5 but less than 10 years* the approximate date for parole consideration is 12 months prior to the minimum release date; for those serving *more than 10 but less than 15 years*, approximately 24 months prior to the minimum release date; and for those serving *over 15 years*, 36 months prior to the minimum release date.

**For most inmates** not receiving “good time,” the parole consideration date is set at the lesser of 1/3 of the sentence or 10 years. This parole consideration date is set by a majority vote of the Parole Board and applies only to certain offenders. The Parole Board’s rules and regulations provide a different parole consideration date for serious offenders.

**Serious offenders**, those convicted of *murder, attempted murder, rape I, sodomy I, sexual torture, kidnapping I, or where serious physical injury occurred, robbery I, burglary I and arson I*, generally are not granted parole consideration until serving 15 years or 85% of the sentence, whichever is less. This rule is sometimes referred to as the Board’s 85% rule. Realistically it is the “15 year” rule because 15 years is the parole consideration date for any offender sentenced to 18 years or more for the listed offenses.

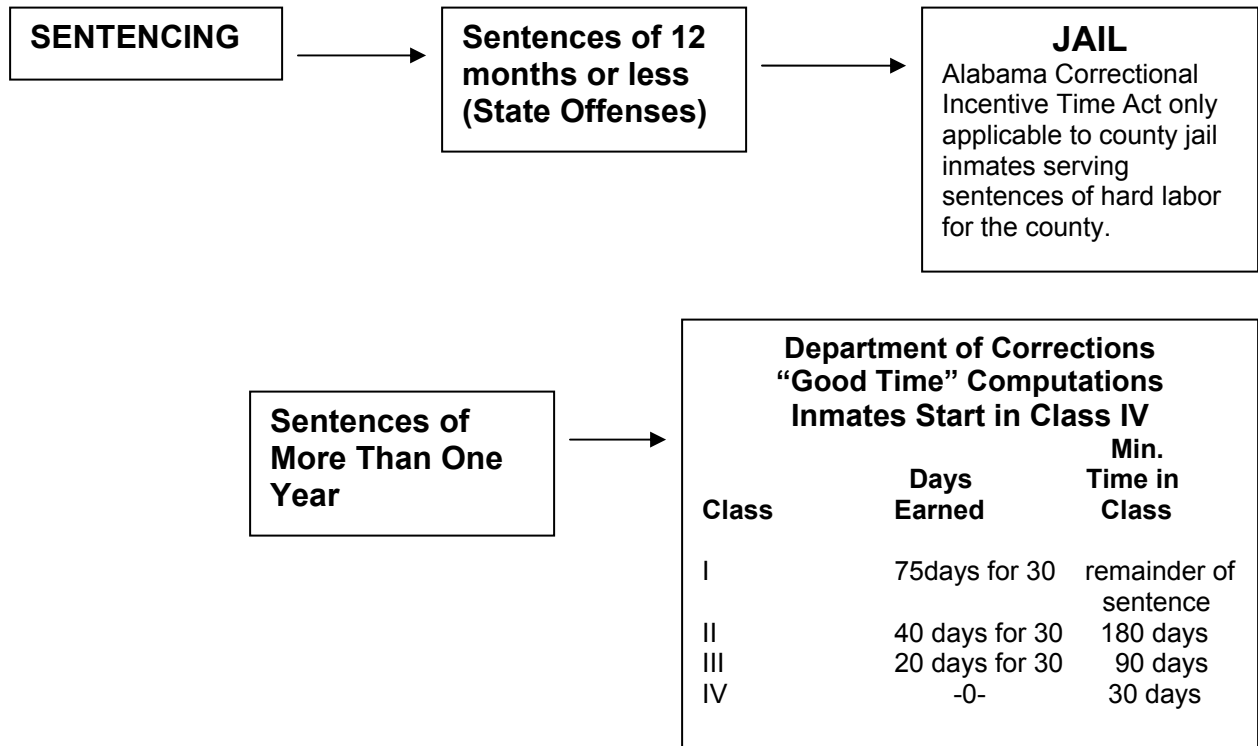
The Board of Pardons can set earlier dates for parole consideration by *unanimous* vote of its three members. In exercising its broad discretionary authority, the Board could parole a prisoner as early as six weeks after sentencing, delayed only by the time required for investigations and notices to be completed.

The complexities of the various parole release dates will be simplified when the Sentence Reform Act of 2003 is fully implemented. According to the provisions of the Sentencing Reform Act of 2003, Act 2003-354, a mandatory term of supervised post-incarceration release will be required for felony offenders sentenced to a term of imprisonment, in addition to the period of incarceration imposed. This recommendation is made in recognition of the fact that offenders leaving prison need a supervised reentry program to reintegrate into the free world. During the last quadrennial, approximately 40% of Alabama inmates that were released from prison returned to the community after serving their sentence (referred to as “end of sentence” or “EOS”) with no supervision or reentry plan in place.

See [www.pardons.state.al.us](http://www.pardons.state.al.us) for Board of Pardons and Pardons Rules and Regulations.



### C. Summary of Alabama Parole and Good Time Laws



### Discretionary Parole Eligibility

Inmates Eligible for "Good Time"		Not Receiving "Good Time"	Serious Parole Eligible Offenders
<i>Sentence</i>	<i>Eligibility Date</i>	As soon as practicable after eligible for release by majority vote – 1/3 of sentence or 10 years, whichever is less.	15 years or 85% of sentence, whichever is less.  * Murder, attempted murder, rape 1, sodomy 1, sexual torture, kidnapping 1 and if involving serious physical injury, arson 1, robbery 1, and burglary 1
Up to 5 years	Current docket		
5-10 years	App. 12 months prior to min. release date		
10-15 years	App. 24 months prior to min. release date		
Over 15 years	App. 36 months prior to min. release date		



## **IX. Alternative Sentencing**

### **A. Straight Probation (not split)**

For sentences of 15 years or less, the sentencing judge may suspend execution of the sentence and place the defendant on probation or “impose a fine within the limits fixed by law and also place the defendant on probation.” §15-22-50, *Code of Alabama 1975*.

5 Year Limitation for Felons

3-Year Limitation Applies to Youthful Offenders

2-Year Limitation for Misdemeanants

For youthful offenders the term of probation may not exceed 3 years, including consecutive sentences. § 15-19-6, *Code of Alabama 1975*; *Ex parte Jackson*, 415 So.2d 1169 (Ala. 1994). *See also, Minschew v. State*, 2007 WL 866210 (Ala.Crim.App. March 23, 2007), where, in dicta, the Court of Criminal Appeals noted that this same rationale would apply to sentences imposed on multiple counts of the same case for adult felony offenders, and the total probationary term of consecutive probation sentences could not exceed the statutory maximum of five years pursuant to §15-22-54(a).

#### Revocation of Probation or Suspension of Execution of Sentence

“If the court revokes probation, it may, after a hearing, impose the sentence that was suspended at the original hearing or any lesser sentence, including any option listed in subdivision (1).” § 15-22-54(d)(2)

#### *Credits Upon Revocation – Limit on Confinement*

“If revocation results in a sentence of confinement, credit shall be given for all time spent in custody prior to revocation. Full credit shall be awarded for full-time confinement in facilities such as county jail, state prison, and boot camp. Credit for other penalties, such as work release programs, intermittent confinement, and home detention, shall be left to the discretion of the court, with the presumption that time spent subject to these penalties will receive half credit. The court shall also give significant weight to the time spent on probation in substantial compliance with the conditions thereof. The total time spent in confinement may not exceed the term of confinement of the original sentence.” § 15-22-54(d)(3)

#### *Grounds for Revocation*

“The court shall not revoke probation and order the confinement of the probationer unless the court finds on the basis of the original offense and the probationer’s intervening conduct, either of the following:

- a. *No measure short of confinement will adequately protect the community from further criminal activity by the probationer.*
- b. *No measure short of confinement will avoid depreciating the seriousness of the violation.*

§ 15-22-54(d)(4)

Upon revocation of probation, the court may split the original sentence, but the total time spent in confinement may not exceed the original maximum period the offender would have served under the original sentence, without regard to any deductions. *Parker v. State*, 648 So.2d 653 (Ala. Crim. App.1994); *Phillips v. State*, 755 So.2d 63 (Ala.Crim.App. 1996). See also Rules 27.2, 27.4, 27.5, Alabama Rules of Criminal Procedure.

#### Payment of Fines, Costs and Restitution

A court order to pay a fine, costs and restitution is an absolute liability and is not dependent on the probationary term and discharge from probation does not release the defendant from his or her obligation to pay. *Little v. State*, 693 So.2d 30 (Ala.Crim.App.1997).

#### Termination of Probation

The probationary period ends when the probationer either: (1) successfully fulfills the conditions of probation, or (2) receives a formal discharge from the trial court. *Sherer v. State*, 486 So.2d 1330 (Ala.Crim.App. 1986); *Boles v. State*, 717 So.2d 877 (Ala.Crim. App. 1998); *Owens v. State*, 728 So.2d 673 (Ala.Crim.App. 1998); *See also* James v. Owens 12006 WL 1008973 (M.D. Ala, April 17, 2006) and Rule 27.3, Alabama Rules of Criminal Procedure.

#### Revocation of Probation - Initiation

Probation revocation proceedings can be initiated after the probationary period has expired if there has been no formal discharge from probation. *Watkins v. State*, 455 So.2d 160 (Ala.Crim.App. 1984); *Young v. State*, 552 So.2d 879 (Ala.Crim.App. 1989); *Boles v. State*, 717 So.2d 877 (Ala.Crim.App. 1998); *Owens v. State*, 728 So.2d 673 (Ala.Crim.App. 1998).

#### Revocation – Jurisdiction

The trial court retains the jurisdiction to revoke probation if revocation proceedings are instigated during the actual court ordered probationary period or before the end of the maximum statutory period. *Gore v. State*, 895 So.2d 106 (Ala. Crim. App. 2004).

### **B. Split Sentence**

The split sentence is now used as the preferred sentencing option for over 40% of convicted felons. This statute may be utilized for any offender convicted and sentenced to a period of incarceration of 20 years or less, with the actual term of imprisonment as follows:

Sentence of ***up to 15 years imprisonment - no more than 3 years actual confinement*** (which is not subject to parole or good time deductions), with remainder of the sentence suspended.

Sentence of ***greater than 15 but not more than 20 years imprisonment - not less than three but no more than five years confinement*** which is not subject to parole or good time deductions but may be suspended in whole or part.  
§ 15-18-8, *Code of Alabama 1975*.

### **1. Boot Camp**

Section 15-18-8(a)(2), *Code of Alabama 1975*, authorizes a judge to sentence defendants convicted and sentenced under the split sentence statute to “boot camp” “upon consultation with the Commissioner of the Alabama Department of Corrections.” These are military-style disciplinary and rehabilitation conservation programs that operate under the rules and regulations of the Department of Corrections.

Progress reports, advising whether the defendant has completed or not completed the program are provided to the sentencing court by the Department of Corrections. Upon receipt of these reports the sentencing court is authorized to:

- ☐ “suspend the remainder of the sentence and place the convicted defendant on probation;
- ☐ “order the convicted defendant to be confined to a prison, jail-type institution or treatment institution for a period not to exceed three years and that the execution of the remainder of the sentence be suspended and the defendant be placed on probation for such period and upon such terms as the court deems best.”

When additional confinement is imposed, credit must be given for the actual time served in the program by the offender.

Excluded offenders – Offenders sentenced to life imprisonment without parole and offenders that are now, or have ever been convicted of the following offenses are prohibited from participating in the “boot camp” program:

- Murder;
- Rape in the first degree;
- Kidnapping in the first degree;
- Sodomy in the first degree;
- Enticing a child to enter a vehicle, house, etc., for immoral purposes;
- Arson in the first degree; and
- Robbery in the first degree



## **2. Certain Enhancements Can Be Suspended**

**Mandatory Minimums No Longer Mandatory After Amendment of Alabama's Split Sentencing Statute For Sentences of 20 years or Less – Must be imposed, but can be suspended.**

***Soles v. Alabama*, 820 So.2d 163 (Ala.Crim.App. 2001)**

The recent amendment to Alabama's split sentencing statute (effective 5/25/01) supersedes the prohibitions against suspension of the 5 year mandatory enhancement provisions in § 13A-12-250 and § 13-12-270 for the sale of drugs within 3 miles of a school or housing project and allows a trial court to suspend sentences of 20 years or less. *See also Tucker v. State*, 833 So.2d 668 (Ala.Crim.App. 2001).

In *Soles*, the Court of Criminal Appeals held that Alabama's split sentencing statute (§ 15-18-8), as last amended, allows a trial court to suspend a sentence imposed upon application of the five year enhancement statutes for persons convicted of the unlawful sale of a controlled substance within three miles of a school or public housing project. While the *Soles* opinion did hold that a trial court was authorized to suspend a 3 mile radius drug enhancement sentence (§13A-12-250 and 270) after it is imposed, neither *Soles* or the amended split sentence requires a trial court to do so. *Moore v. State*, 871 So.2d 106 (Ala.Crim.App. 2003).

### **C. Felony DUI**

Confinement May be in County Jail if Sentence Does Not Exceed 3 Years

The minimum sentence shall include a term of imprisonment for one year and one day, of which 10 days is mandatory. The remainder of the term of imprisonment can be suspended or probated if the defendant is placed on probation and a condition of probation is that (s)he "enrolls and successfully completes a state certified chemical dependency program recommended by the court referral officer and approved by the sentencing court." § 32-5A-191(h).

The Felony DUI statute specifically provides that, where the defendant is granted probation, "the sentencing court may, in its discretion, and where monitoring equipment is available, place the defendant on house arrest under electronic surveillance during the probationary term." § 32-5A-191(h).

## **D. Community Corrections Programs**

### **Supervision and Treatment are Essential to Offender Accountability.**

Successful reform of Alabama's criminal justice system requires a true continuum of sanctions containing viable sentencing options. As prisons have filled beyond capacity, probation rolls have also soared beyond capacity and planned transition from a prison environment to the free world has been almost non-existent. Alabama must improve in all of these areas, establishing a true continuum of sanctions that protects public safety by making sure that the sentence fits the crime and the offender.

Prison is the most costly sentencing option and should, therefore, be used only where it exists as the only feasible punishment option for holding a violent or repeat offender accountable for his or her offense(s). Simple probation is the least costly sentencing option and should be used for offenders who evidence a minimum risk of re-offending. These two sanctions are the outer limits of a continuum of sanctions that provides options of increasing limitations on liberty from straight (unsupervised) probation to prison (full incarceration at a state institution).

Major crimes and violent offenders require incarceration. Based on the Sentencing Commission's felony offender cohort for 2006, these offenders make up only about 24% of those sentenced last year. If alternatives are available, the remaining 76% of offenders sentenced can be considered for effective community supervision and treatment alternatives.

### **Continued Expansion of Intermediate Punishment - Alternative Sentencing**

The governing principle to guide trial court judges in criminal sentencing was established in 1991 by the Alabama Supreme Court with adoption of Rule 26.8 of the Alabama Rules of Criminal Procedure. This principle calls for the least restrictive sanction based on the gravity of the crime, taking into consideration safety to the public and the impact of the sentence on all facets of the criminal justice system.

*The sentence imposed in each case should call for the least restrictive sanction that is consistent with the protection of the public and the gravity of the crime ... Judges should be sensitive to the impact their sentences have on all components of the criminal justice system and should consider alternatives to long-term institutional confinement or incarceration in cases involving offenders whom the court deems to pose no serious danger to society.*

Although this principle has existed for over a decade, it is only recently that sentencing options beyond probation have become available in Alabama.

## **Community Corrections Can Provide Judges with a Wider Array of Sentencing Options for Nonviolent Offenders**

Historically, there have been only two real options available for Alabama judges to choose from when imposing criminal sentences - probation and imprisonment. Community-based corrections programs, which focus on both rehabilitation and punishment, can provide additional levels to the sentencing spectrum with enhanced supervision and treatment options beyond those available under traditional probation supervision. Through the use of community punishment and corrections programs, judicial officials have greater control over elements of the sentences imposed and the offender has a greater chance of becoming a productive and law-abiding citizen by maintaining employment, obtaining treatment for problems with drug or alcohol abuse, and paying fines, court costs, and victim restitution.

Intermediate punishment fulfilled under the supervision of community corrections programs permit offenders to pay their debt to society while remaining sufficiently linked with the community to support their families and make restitution to the victims. Offenders participating in community corrections programs may be required to repay the community through community service work, undergo drug and alcohol testing and treatment, make restitution to victims, submit to intensive supervision, participate in work release programs, undergo house arrest with or without electronic monitoring, and comply with day reporting requirements and probation monitoring with varying levels of supervision. Rehabilitative programs that can be offered through community programs include literacy training, job training, job placement and GED preparation. Moreover, community-based sanctions are less expensive than prison, inasmuch as they do not require investment in a secure prison infrastructure and the associated manpower needs.

### **Expansion Efforts**

In the last six years, Alabama has made advances in the expansion and utilization of community correction programs as a viable intermediate punishment alternative for nonviolent felony offenders. While there has been improvement, additional work remains to create a true continuum of punishment and provide sentencing options that range from probation to incarceration, graduating the level of punishment for violations and for inmates released from prison for their successful reentry into the community.

For over two decades, the one reoccurring recommendation of commissions and committees that have studied Alabama's criminal justice system has been the development of intermediate sentencing options. With the establishment of the Alabama Sentencing Commission, the Legislature specified that it would be one of the prioritized goals of the Commission to establish a criminal justice system with a wider array of sentencing options for nonviolent offenders. Since that time, Commission members and staff have worked closely with the Alabama Association of Community Corrections and the Department of Corrections to establish community corrections programs statewide and to improve existing programs to provide services and supervision to offenders that address their needs.

Until FY 2006, General Fund money has not been available to sufficiently fund existing community correction programs for an entire fiscal year. In prior years, funds were depleted prior to the end of the fiscal year, resulting in existing programs not receiving reimbursement payments from the Department of Corrections for the full year. FY 2006 was the first year that sufficient funding was provided by the Legislature to enable ADOC to reimburse programs for felony diversion, offer assistance in expansion costs, and provides start-up grants to counties or circuits seeking to establish a community corrections program.

In FY 2006, reimbursement to 26 community correction programs by the Department of Corrections for diverted felony offenders totaled \$2,586,975.<sup>1</sup> An additional \$2,696,956 in expansion grants to 10 programs was provided,<sup>2</sup> along with \$676,900 start-up grants to 6 programs.<sup>3</sup>

#### **ADOC General Fund Appropriations Earmarked for Community Corrections**

FY 00 \$1.5 million  
FY 01 \$1.5 million  
FY 02 \$2 million  
FY 03 \$2.975 million (\$2 million + \$975,000 supplemental)  
FY 04 \$2.975 million  
FY 05 \$2.975 million  
FY 06 \$6.2 million (\$5.2 million + \$1,000,000 supplemental)  
FY 07 \$6.1 million

#### **Cost Savings by Diversion to Community Corrections**

The average daily cost of a community corrections offender for FY 2006 was \$9.12 as compared to \$36.76 per day for an inmate incarcerated in the penitentiary. ADOC estimates that by diverting felony offenders to community corrections programs, there was a cost savings of almost \$92 million dollars. This savings reflects the tax savings of approximately \$12 million realized just this year by the reduced costs of housing the offenders in correctional facilities and the estimated \$80 million in construction costs that would be required to build a new facility to house these offenders. Further comparison of the reimbursements provided by ADOC to the community corrections programs against immediate savings in housing costs show a positive return on investment of over \$9.3 million.

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<sup>1</sup> 4<sup>th</sup> Judicial Circuit (Bibb, Dallas, Hale, Perry, and Wilcox Counties), 24<sup>th</sup> Judicial Circuit (Fayette, Lamar, Pickens Counties), 25<sup>th</sup> Circuit (Marion and Winston Counties), Blount, Calhoun, Cherokee, Colbert, Cullman, Dale, DeKalb, Escambia, Etowah, Franklin, Geneva, Houston, Jackson, Jefferson, Lauderdale, Lawrence, Limestone, Marshall, Mobile, Montgomery, Shelby, Tuscaloosa, and Walker Counties.

<sup>2</sup> 4<sup>th</sup> Judicial Circuit (Bibb, Dallas, Hale, Perry, and Wilcox Counties), 25<sup>th</sup> Judicial Circuit (Marion and Winston Counties), Calhoun, Colbert, Dale, Franklin, Jefferson, Lauderdale, Lawrence, and Montgomery Counties.

<sup>3</sup> 2<sup>nd</sup> Judicial Circuit (Butler, Crenshaw and Lowndes Counties), Blount, Colbert, Limestone, Madison and St. Clair Counties.

Last year the Alabama Association of Community Corrections began advocating the expansion and improvement of services offered by community corrections programs to felony offenders, the development of uniform program standards, and the need to provide assistance to courts in completing sentencing worksheets for those felons convicted of crimes covered by the sentencing standards. In the latter part of FY 2006, the Association also began focusing on training for directors and staff. Training has been offered by the ADOC and sessions are expected to begin in FY 2007. While these projects are not ones that will easily convert to immediate cost savings, improvement in services will ultimately lead to increased utilization of the programs by judges and, it is hoped, a reduction in recidivism.

### **What are Community Corrections Programs?**

Community Punishment programs offer a variety of services as alternative punishment options for judges to utilize and assist the state and counties in reducing the number of offenders committed to state prisons and county jails. In addition to rehabilitation, a major objective of community corrections is to provide services that expand the options available for sentencing criminal defendants. By diverting low-risk felony offenders to community corrections programs, scarce prison space is available for the incarceration of violent and repeat offenders.

### **Types of Programs**

Community corrections programs can be one of three types pursuant to the Community Punishment and Corrections Act of 2003: a county agency, a county (non-profit) authority or a private non-profit 501(c)(3). Currently 20 of the 29 programs (69%) are private non-profit organizations: Jefferson, Blount, Butler, Crenshaw, Lowndes, St. Clair, Colbert, Calhoun, Shelby, Cullman, Walker, Marshall, DeKalb, Cherokee, Jackson, Franklin, Dale, Geneva, Lawrence, the 24th Circuit (Fayette, Lamar, and Pickens), the 25th Circuit (Winston and Marion), and the 4th Circuit (Dallas, Bibb, Hale, Perry and Wilcox). Seven (7) of 29 of the programs (23%) are non-profit county authorities: Limestone, Madison, Montgomery, Tuscaloosa, Houston, Etowah and Lauderdale. Two (2) programs (8%) are county agencies: Mobile and Escambia.

### **Existing Programs**

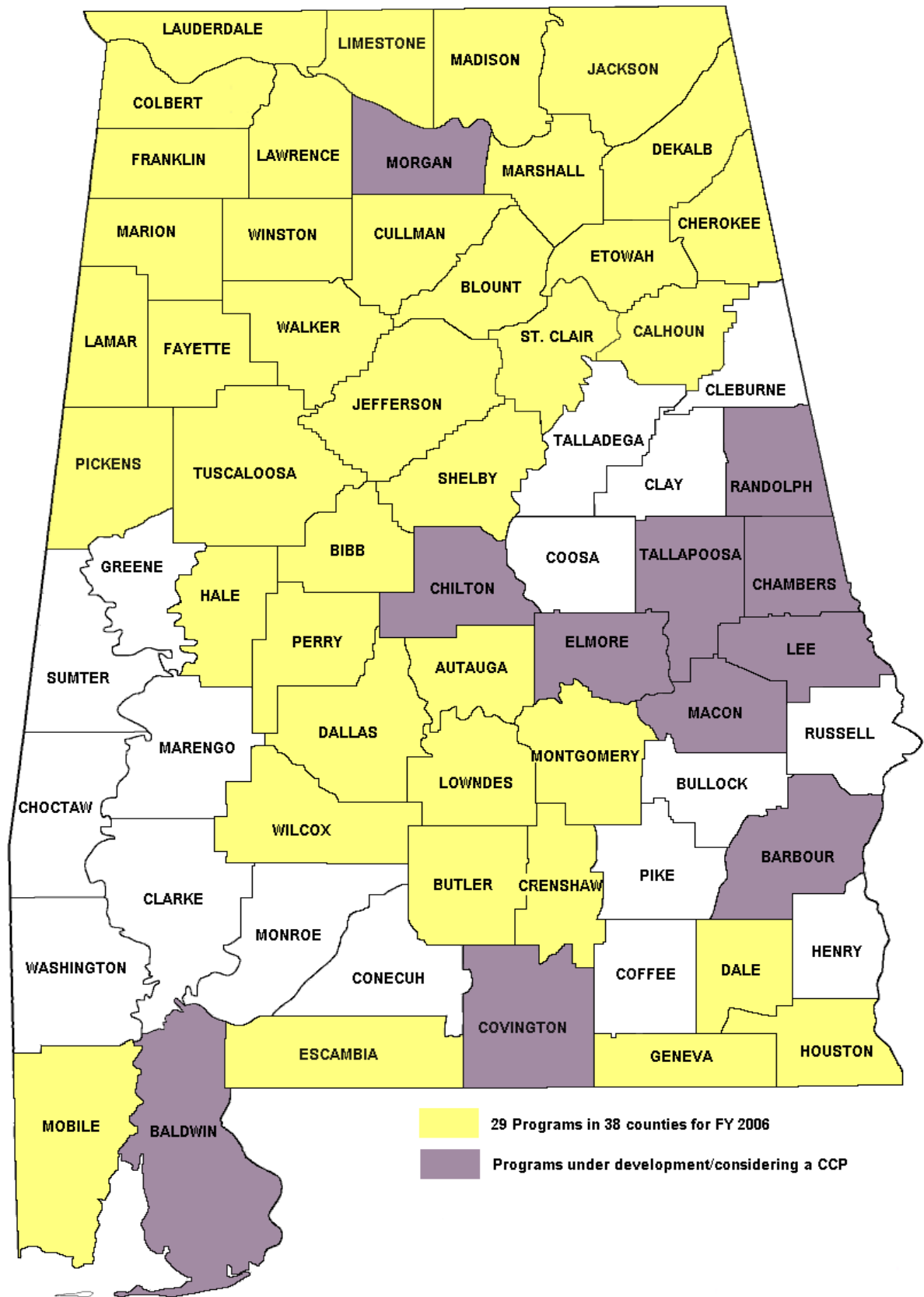
There are currently 29 community corrections programs in the state serving 38 counties. One-third of the active programs have been formed since 2000, with DOC reimbursing programs for a total of 5,000 diversions over the last three fiscal years. The 29 existing Community Punishment and Corrections programs in the state and the counties they serve are listed on the following page.

At the present time, there are only a few community correction programs that have in house treatment facilities operating in the community. New programs and existing programs are considering establishing such facilities to concentrate on in-house treatment for offenders with drug and alcohol addictions.

In 2006, four new programs were established, representing six additional counties: Blount, Limestone, Madison and the 2<sup>nd</sup> Judicial Circuit consisting of Butler, Crenshaw and Lowndes counties. Other counties that have expressed an interest in establishing a community corrections program are: Autauga/Elmore, Baldwin, Barbour/Bullock (3<sup>rd</sup> Circuit), Chilton, Choctaw/Clarke/Washington (1<sup>st</sup> Circuit), Clay/Coosa (40<sup>th</sup> Circuit), Cleburne, Covington, Morgan, Lee, Russell, Talladega, Tallapoosa, and Washington.

#### **Counties With Existing Community Punishment and Corrections Programs For Nonviolent Felony Offenders**

1. Bibb - 4<sup>th</sup> Judicial Circuit Community Corrections
2. Blount - Blount County Community Corrections
3. Butler - 2<sup>nd</sup> Judicial Circuit
4. Colbert - Colbert County Community Corrections
5. Calhoun - Calhoun County Community Punishment & Corrections Authority
6. Cherokee - Cherokee County Community Corrections
7. Crenshaw - 2<sup>nd</sup> Judicial Circuit
8. Cullman - Cullman County Community Corrections
9. Dale - Dale County Community Corrections
10. Dallas - 4<sup>th</sup> Judicial Circuit Community Corrections
11. DeKalb - DeKalb County Community Corrections
12. Escambia - Escambia County Community Corrections
13. Etowah - Etowah Community Corrections
14. Fayette - Fayette, Lamar & Pickens Counties Community Corrections
15. Franklin - Franklin County Community Corrections
16. Geneva - Geneva County Community Corrections
17. Hale - 4<sup>th</sup> Judicial Circuit Community Corrections
18. Houston - Houston County Community Corrections
19. Jackson - Jackson County Community Punishment & Corrections
20. Jefferson - Jefferson County Community Corrections – TASC
21. Lamar - Fayette, Lamar & Pickens Counties Community Corrections
22. Lauderdale - Lauderdale County Community Corrections & Punishment Authority
23. Lawrence - Lawrence County Community Corrections
24. Limestone - Limestone County Community Corrections
25. Lowndes - 2<sup>nd</sup> Judicial Circuit
26. Madison - Madison County Community Corrections
27. Marion - Marion & Winston Counties Community Corrections
28. Marshall - Marshall County Community Corrections
29. Mobile - Mobile County Community Corrections Center
30. Montgomery - Montgomery County Community Punishment and Corrections
31. Perry - 4<sup>th</sup> Judicial Circuit Community Corrections
32. Pickens - Fayette, Lamar & Pickens Counties Community Corrections
33. Shelby - Shelby County Community Corrections
34. St. Clair - St Clair County Community Corrections
35. Tuscaloosa - Tuscaloosa County Community Corrections
36. Walker - Walker County Community Corrections
37. Wilcox - 4<sup>th</sup> Judicial Circuit Community Corrections
38. Winston - Marion & Winston Counties Community Corrections



## **Direct Sentence to Community Corrections**

Pursuant to Alabama's Community Punishment and Corrections Act (§15-18-170 et seq.), a judge may sentence an eligible offender directly to a community corrections program as an alternative to prison, as a part of, or in conjunction with a split sentence, or as a condition of probation. The duration of the sentence for an offender that is sentenced to a community-based program can be for "any period of time up to the maximum sentence within the appropriate sentence range for the particular offense," taking into consideration that the participation level may not exceed the program's maximum capacity limit. Offenders sentenced to community corrections programs pursuant to the Community Corrections Act are not eligible for parole consideration. Those felony offenders that are diverted to community corrections programs either as front-end diversions or institutional diversions, are considered ADOC inmates and are entitled to good time credit while participating in the program.

## **Front-End and Institutional Diversions**

There are two types of diversions – referred to as front-end diversions and institutional diversions. *Front-End diversions* are felons directly sentenced to a community corrections program that would otherwise be sentenced to incarceration in the penitentiary. The Department approves inmates for front-end diversion if they are not excluded by committing a statutorily prohibited crime and score 10 points or more on the Department of Corrections diversion checklist. The *Department of Corrections' diversion checklist* is a measure of likelihood that a defendant will be committed to prison based on factors such as the type of crime committed, prior convictions, (both felony and misdemeanor), victim injury, juvenile record and probation/parole status. Funding is allocated only to those offenders that receive 10 points or more and are not convicted of an excluded offense. The 10 point scale is utilized to ensure that state reimbursement is provided only for those offenders that would otherwise be sent to prison - not those that would have been released on probation or given jail time. The only exception to compliance with the 10 point checklist as a prerequisite for reimbursement by ADOC is when the new sentencing standards apply and the recommendation under the standards is for the defendant to be sentenced to prison. If the court sentences the offender to an approved community corrections program, the community corrections program can receive reimbursement from ADOC, even if the offender fails to score 10 or more points on the department's reimbursement checklist.

Applying the sentencing standards where the sentence recommendation is incarceration, a court will be considered as complying with the standards if an eligible offender is sentenced to "Community Corrections at ADOC." Under this sentence, the offender will be subject to supervision by the community corrections program but still considered an ADOC inmate although not actually housed in an ADOC facility. The program will be authorized to receive reimbursement from ADOC at the front-end diversion rate and the offender will be eligible for "good time" credit while under supervision, but will not be eligible for parole.

*Institutional diversions* are state inmates incarcerated in a state facility approved by the ADOC and authorized by the sentencing judge to participate in an ADOC approved



community corrections program. These inmates do not have to meet the 10 point scale and must not be excluded under §15-18-171 (14). Approval must be granted by the Department of Corrections and sentencing judge before an inmate can be released to a community corrections program and accepted by the program.

**Felons Excluded from Consideration for Direct Sentencing to Community Corrections Programs §15-18-171(14)**

**Statutory Exclusions**

Any felon convicted of the following offenses:

- 1) murder
- 2) kidnapping 1<sup>st</sup>
- 3) rape 1<sup>st</sup>
- 4) sodomy 1<sup>st</sup>
- 5) arson 1<sup>st</sup>
- 6) selling or trafficking in controlled substances
- 7) robbery 1<sup>st</sup>
- 8) sexual abuse 1<sup>st</sup>
- 9) forcible sex crimes
- 10) lewd and lascivious acts upon a child
- 11) assault 1<sup>st</sup> if the assault leaves the victim permanently disfigured or disabled; or
- 12) any person that demonstrates a pattern of violent behavior. “In reaching this determination, the court *may* consider prior convictions and other acts not resulting in conviction or criminal charges, and the offender’s behavior while in state or county confinement.”  
§ 15-18-175(b)(2)

The above eligibility criteria are guidelines for the benefit of the court in making a determination of eligibility of offenders and assessment of funds under the Community Corrections Act.

§ 15-18-175 (c)

**Offenders Excluded From Institutional Diversion to Community Corrections by ADOC Regulation (As amended 2007)**

- 1) Any sex offenders, i.e., inmates with an AIS “S” suffix (including pornography)
- 2) Inmates in other states. These are inmates serving a sentence from another state in addition to their Alabama sentence. Inmates sentenced from Alabama only and simply housed in another state are not excluded.
- 3) Inmates in SIR
- 4) Inmates in Drug Treatment (inmates from dorms CB, DP, RP, and TC)
- 5) Inmates set to be released within two months (60 days)
- 6) Inmates who were sentenced within 3 months (excludes new inmates from being considered)

- 7) Inmates who have an escape for this incarceration
- 8) Inmates that have 21 or more disciplinaries
- 9) Inmates with 9 or more major disciplinaries
- 10) Inmates that have ever, even prior incarcerations, had a drug crime that includes trafficking, distribution or the sale of drugs.
- 11) Inmates who have ever been convicted, even on prior incarceration, of any of the following offenses:

1. Aggravated murder
2. Murder by life sentence convict
3. Murder
4. Manslaughter
5. Rape 1<sup>st</sup>, 2<sup>nd</sup>
6. Sexual abuse 1<sup>st</sup>
7. Sodomy 1<sup>st</sup>, 2<sup>nd</sup>
8. Sexual torture/abuse
9. Soliciting child by computer
10. Violating sex offender registration law
11. Aiding prisoners to escape – felons
12. Arson 1<sup>st</sup>
13. Assault 1<sup>st</sup>
14. Assisting a prisoner escape custody (misd)
15. Attempted murder
16. Child abuse
17. Child molestation
18. Conceal/harbor/aid escaped convict
19. Distributing (if involving sale) controlled substance
20. Controlled substance crime solicit/involve murder or attempt or conspiracy to commit such CS Crime
21. Display/distribute obscenity minor (misd)
22. Parent permit child - obscene matter
23. Parent/permit child production obscene enticing child enter/immoral purpose
24. Possession/obscenity of person under 17
25. Escape from penitentiary or attempt thereof
26. Escape 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>
27. Incest
28. Kidnapping 1<sup>st</sup>, 2<sup>nd</sup>
29. Drug trafficking (amphetamines, cannabis, cocaine, hydro, LSD, methaqualone, opium/morphine/heroin/phencyclidine)
30. Drug trafficking enterprise 1<sup>st</sup> and 2<sup>nd</sup> convict
31. Drug Manufacturing

“Stalking, or crime involving stalking behavior, or felony kidnapping (any degree) or cases wherein the details of the crime reflect behavior which could be construed by the Code of Alabama or constitute a kidnapping even though not convicted of such.”

## **Felony Diversions and Program Reimbursement**

The felony diversion program is designed as an alternative to incarceration to the penitentiary for felons convicted of nonviolent offenses, providing judge's a viable alternative for non-violent offenders. Community Corrections programs contract with the Alabama Department of Corrections to manage felony diversion inmates and, utilizing a sliding scale, pay the programs a specified amount to help offset program costs. By diverting felons, who would otherwise be sent to the penitentiary, to community corrections programs, scarce prison space is reserved for violent and repeat offenders.

### **Rate of Reimbursement**

The Department pays programs for *front-end diversion* at the rate \$15 per day for the first six months, \$10 per day for the next three months and \$5 per day for any remaining days up to a total of a two-year period. For institutional diversions of inmates sentenced on or after September 15, 2005, the Department pays the contracting program \$10 per day for the first six month period in the program and \$5 per day for the next year and a half. On September 20, 2005, new reimbursement rates for institutional diversions were implemented, increasing the reimbursement to \$15 per day for the initial three months, \$10 per day for the next 6 months and \$5 per day for the remainder of the two year period. This revised reimbursement rate, which only applies to inmates sentenced prior to September 15, 2005 who are in an ADOC facility or awaiting transfer from a county jail, authorizes an increased rate of reimbursement to community corrections programs of \$5 per inmate for the first three months of participation in the program. Since the Special Diversion Program applies to institutional diversions, the 10 point checklist will not apply to this program.

At the request of the Alabama Association of Community Corrections, the Department of Corrections has revised the departmental regulation relating to community corrections programs. One major revision was the implementation of a consistent reimbursement rate for both front-end and institutional diversions. Beginning in April of this year programs will be reimbursed \$15 per day up to two years for either type of felony diversion.

In fiscal year 2006, the Department paid programs for 1,836 felony diversions. Of the total reimbursements, 1,108 were new diversions occurring in FY 06, of which 725 (65%) were front-end diversions and 383 (35%) were institutional diversions. While new diversions occurring at the time of sentencing (front-end) continued to outpace institutional diversions, the percentage of front-end diversions dropped 9 percent in 2006, from 74 percent to 65 percent, while the percentage of institutional diversions increased 9 percent in 2006, from 26 percent to 35 percent. These figures do not include felony offenders who did not meet the 10 point scale, yet served some or part of their time with a community corrections program.

County	FY 2006		
	Institutional Diversions	Front End Diversions	Total New Diversions
Blount	3	2	5
Calhoun	1	0	1
Cherokee	7	17	24
Colbert	39	16	55
Cullman	4	8	12
Dale	12	11	23
DeKalb	17	19	36
Escambia	11	5	16
Etowah	12	31	43
Fayette	5	5	10
Franklin	20	15	35
Geneva	0	2	2
Houston	78	46	124
Jackson	2	8	10
Jefferson	4	265	269
Lauderdale	15	22	37
Lawrence	9	17	26
Limestone	4	4	8
Marion	9	2	11
Marshall	0	22	22
Mobile	92	60	152
Montgomery	16	73	89
Shelby	9	61	70
Tuscaloosa	3	14	17
Walker	5	0	5
4 <sup>th</sup> Circuit	6	0	6
<b>Total</b>	<b>383</b>	<b>725</b>	<b>1,108</b>

<b>Diversion of Felony Offenders to Community Correction Programs</b>				
	<b>FY 03</b>	<b>FY 04</b>	<b>FY 05</b>	<b>FY 06</b>
New Diversions	1,127	917	1,156	1,108
Carried Over From Another FY	627	1,086	740	728
Total	<i>1,754</i>	<i>2,003</i>	<i>1,896</i>	<i>1,836</i>

### **Technological Advances in Case Management**

The Administrative Office of Courts has developed an advanced web-based case management system, the Model Integrated Defendant Access System (MIDAS), to assist community corrections programs in monitoring the progress of defendants through the system. MIDAS is an automated system that is integrated with other criminal justice systems allowing access to current information on the offender, including existing criminal and driver history records. In addition to providing networking capability to the various state courts and Law Enforcement Tactical System (LETS), included as a system component is an assessment instrument utilized by Court Referral programs.

This system, which was originally designed as a case management tool for court referral programs, has now been expanded to include community corrections programs and drug courts. Utilizing MIDAS, these programs can produce automatic reports, correspondence, and account information.

### **E. Drug Courts**

Alabama's criminal justice system has evidenced the impact of drug abuse and addiction through the increase in drug and drug related crimes. During FY 06, 47% of convictions and 40% of prison admissions were for drug or felony DUI offenses. While these figures are disturbing, they do not reflect the true seriousness of the problem because property crimes that were drug or alcohol related are not included. That drugs contribute to the escalating prison population may be best evidenced by the fact that during FY 06, there were 17,731 inmates participating in drug treatment programs and, as of February 1, 2007, 877 inmates on the waiting list for admission to a program.

As of April 2007, there were 5,588 inmates participating in an ADOC drug treatment program and 1,009 on a waiting list (637 waiting to participate in the 8-week SAP program, 248 in the Crime Bill program, 64 in the Therapeutic Community program, 52 in the Relapse Prevention program and 8 in the Dual Diagnosis program).

Current program participation among programs is as follows:

	<u>Participants</u>
1. Crime Bill program	1,250
2. 8-week SAP	1,171
3. Relapse Prevention	312
4. Methamphetamine Group	15
5. Dual Diagnosis	74
6. Therapeutic Community	290
7. Pre-Treatment	224
8. Aftercare	2,252

To address this problem, Alabama has established drug courts as an alternative to incarceration for defendants charged with drug and alcohol related offenses. Drug courts are specialized courts that provide an immediate and structured judicial intervention process for substance abuse treatment, bringing together substance abuse professionals, local social programs and judicial monitoring. These courts, designed to provide more comprehensive monitoring and drug testing than other forms of supervision, have proven effective in reducing crime rates among participants and graduates.<sup>4</sup>

Spurred by the increase in drug crime convictions and the desire to focus on the underlying problem to decrease the rate of re-offending among drug offenders through an effective form of intervention, the first drug court was established in Mobile in 1993. Encouraged by its success, Jefferson County created a drug court in 1996, followed by implementation of the Tuscaloosa Drug Court in 1997. Since that time, drug courts have expanded, but at a slow pace. There are currently 17 adult drug court programs in 15 judicial circuits, providing services to 23 counties.<sup>5</sup>

### **The Chief Justice's Drug Court Task Force**

One of Chief Justice Sue Bell Cobb's first actions upon assuming office was to create a 27 member Drug Court Task Force to map out ways to establish an effective drug court in every county of the state. The Task Force, composed of community leaders and representatives from all three branches of government, is chaired by retired District Court Judge Pete Johnson who is nationally recognized for the success of the Birmingham Drug Court.

Among the tasks assigned to the members were establishing uniform standards for the drug court programs and seeking the support and funding necessary to sustain a model statewide drug court system. Collaborative efforts have already proven successful. The Governor has committed \$250,000 to hire retired judges to preside over new drug courts, the Legislature has committed \$1,000,000 to fund treatment services for new drug courts,

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<sup>4</sup> National Drug Court Institute, *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States* (May 2004).

<sup>5</sup> The most recent drug courts that have been established are in the 4<sup>th</sup> Circuit (Dallas, Hale, Perry, Bibb and Wilcox Counties) and Russell County.

and Vera Institute of Justice and Pew Charitable Trusts are assisting with the development of a continuum of comprehensive alternatives to incarceration, including the statewide expansion of drug courts, focusing on training and evaluation.

Strategic planning for success of this initiative involves the incorporation of five major components: 1) statewide eligibility standards to target appropriate prison-bound offenders; 2) standards for treatment services that must include effective risk and need assessments to determine the appropriate level of care placement, types, scope and duration of treatment services; 3) standards for reliable program assessment and evaluation; 4) statewide training for existing drug courts and drug court planning teams and; 5) the development of a statewide management and reporting system for drug courts.

With the assistance of community correction programs and strong support from agencies and leaders in the community, drug courts can be successful in turning criminal offenders into productive and law abiding citizens. In a recent conference sponsored by the U.S. Department of Justice's Drug Courts Program Office and Center for Court Innovation, it was noted that successful reintegration was a key issue that needs to be addressed. Recognizing the important leadership role drug courts play, it was suggested that this leadership should be directed to encourage agencies, program providers, and local communities to take a more proactive approach in identifying available programs, bringing resources into the court and expanding the resources that are available to drug court participants. Through improved discharge planning, including assistance with employment, treatment services, housing, education and employment training, the success drug courts achieve can be optimized.

## **Drug Courts in Alabama**

2 <sup>nd</sup> Judicial Circuit Butler, Crenshaw, and Lowndes Counties	Jefferson County Drug Court 10 <sup>th</sup> Judicial Circuit
4 <sup>th</sup> Judicial Circuit Bibb, Dallas, Hale, Perry and Wilcox Counties	Madison County Drug Court 23 <sup>rd</sup> Judicial Circuit
Cherokee County Drug Court 9 <sup>th</sup> Judicial Circuit	Marshall County Drug Court 27 <sup>th</sup> Judicial Circuit
Colbert County Drug Court 31 <sup>st</sup> Judicial Circuit	Mobile County Drug Court 13 <sup>th</sup> Judicial Circuit
DeKalb County Drug Court 9 <sup>th</sup> Judicial Circuit	Montgomery County Drug Court 15 <sup>th</sup> Judicial Circuit
Escambia County Drug Court 21 <sup>st</sup> Judicial Circuit	Russell County Drug Court 16 <sup>th</sup> Judicial Circuit
Etowah County Drug Court 16 <sup>th</sup> Judicial Circuit	Shelby County Drug Court 18 <sup>th</sup> Judicial Circuit
Franklin County Drug Court 34 <sup>th</sup> Judicial Circuit	Tuscaloosa County Drug Court 6 <sup>th</sup> Judicial Circuit
Jefferson Co. Bessemer Drug Court 10 <sup>th</sup> Judicial Circuit	

Baldwin County (28<sup>th</sup> Circuit) is in the process of establishing a drug court, and is scheduled to begin operation in FY07. In addition to adult drug courts, there are juvenile drug courts established in six counties: Jefferson, Madison, Marshall, Mobile, Shelby and Tuscaloosa Counties.





## **F. Alabama Board of Pardons and Paroles**

The Board of Pardons and Paroles and staff have taken steps to meet the challenge of expanding alternative sentencing options while increasing Alabama's ability to provide additional, more meaningful supervision for probationers and parolees. However, these steps provide only a beginning and much remains to be done. Alabama must greatly expand these initial steps to solve the problems of a burgeoning prison and community supervision population.

### **Implementing the Initial Voluntary Sentencing Standards**

After legislative approval of the Initial Voluntary Sentencing Standards in 2006, the Board of Pardons and Paroles assisted the Sentencing Commission Staff in presenting workshops to teach the use of the standards to appropriate personnel across Alabama. The Executive Director or Deputy Director attended every seminar, explaining to those present the role of probation and parole services in implementing the standards. In addition, all probation and parole officers who had not received training were required to attend the workshops, making sure they were prepared for implementation on October 1, 2006.

The Sentencing Commission and staff are extremely grateful to the Board for providing invaluable assistance in accomplishing this monumental task.

### **Improved Supervision**

Three changes in probation and parole supervision have enhanced the ability of probation and parole officers to better protect public safety by providing more realistic supervision of each offender. These changes are: (1) the increase in probation and parole officers, reducing the caseload of these officers; (2) the adoption of a risk and needs assessment tool for determining the level of supervision needed for each offender and identifying programs that will assist the offender in changing to a crime-free lifestyle; and (3) the change from "contacts" based supervision to "results" based supervision. These innovations reflect a change in the direction of community supervision for parolees and probationers in Alabama.

#### *Increased number of parole and probation officers.*

In the last two years, Alabama has increased the number of probation and parole officers providing field supervision for probationers and parolees. These additions, along with other factors, have allowed a decrease in the average caseload of a supervising officer from 203 to 159 offenders. While this decrease in caseloads is significant and allows officers to spend more time supervising each offender, in many instances, this number still represents an unmanageable caseload for officers in many larger counties, and remains well above the caseload of 100 per officer recommended by the Alabama Sentencing Commission. There is a continuing need for increasing the number of field supervising officers to better manage caseloads based on the risks and needs of the offenders. The Sentencing Commission continues to recommend that the Legislature

increase funding to the Board of Pardons and Paroles to finance the hiring of 60 additional officers each year until the caseload goal of 100 per officer is met.

### *Adoption and Implementation of A Risk and Needs Assessment Tool*

The Alabama Sentencing Commission has long recognized the advantages of using a risk and needs assessment tool as an instrument for projecting the level of risk an offender poses to the community and identifying those needs that must be met to support crime free behavior for the offender. In 2004-2005, Pardons and Paroles adopted a risk and needs assessment tool developed for Alabama by the National Council on Crime and Delinquency. In 2005-2006, that instrument has been implemented for purposes of planning probation requirements and parole eligibility. In addition, the instrument is used to identify areas in which parolees must improve to lead a crime free life. The development and implementation of this tool has led to a change in the supervision method used by parole and probation officers to the more realistic “results” based supervision.

An additional use of the risk and needs assessment instrument is the collection of offender specific data for use in determining the effectiveness of sentencing policies and treatment programs. For this information to be accessible, it is recommended that Pardons and Paroles develop an electronic application for this instrument. Electronic data will save innumerable manpower hours in collecting empirical data for evaluating policies and programs. The Board of Pardons and Paroles is encouraged to take immediate steps to make this type of data available for implementation of evidence-based practices.

### *Change in Supervision Accountability*

In 2006, Pardons and Paroles experienced its first full year of “results” based supervision rather than “contacts” based supervision. The “results” based supervision was made possible by the implementation of the risk and needs assessment. Under this method of supervision, an offender’s success is measured by whether the offender makes progress in those areas identified as needs by the assessment instrument, i.e. undertakes substance abuse treatment, makes progress towards achieving a GED, makes progress toward learning a marketable skill, engaging in an anger management course, and improving life skills, etc. Identifying and changing behaviors that contribute to criminal conduct improves the safety of Alabama’s communities, as well as, creating more productive citizens out of ex-felons.

### **Electronic PSI Expansion**

Traditionally, pre- or post-sentence investigations (PSI) have been completed for only about one half of Alabama’s convicted felony offenders. These investigation reports bring valuable information to the attention of the courts and to those supervising convicted felons and are useful in determining the most appropriate supervision for each offender. The information contained in these reports includes offender demographics (age, personal and family history, education and military history, etc), as well as offense demographics (details of the offense, age, sex and race of the victim, relationship of the

offender to the victim etc) and prior criminal history. While this information appears essential to sentencing, it is difficult to perceive how a supervising officer can perform his or her functions without having this information as part of the offenders file. For this reason, as well to collect this data for analysis purposes, electronic presentence or postsentence investigation reports are now required to be completed for all convicted felony offenders. In 2006, probation services completed over 14,886 electronic PSIs. This number compares well with the 17,956 persons convicted of felony offenses in the Alabama Sentencing Commission 2006 cohort.

A related matter pertaining to historical demographic data on offenders was the statewide accessibility by judges, prosecutors and probation officers of prior youthful offender and juvenile delinquency adjudications. After conducting the first regional workshops on implementation of the sentencing standards, it became apparent that access to these records varied from county to county, and that very rarely did key criminal justice officials, including judges, have statewide access to this information. To remedy this situation, the Sentencing Commission requested assistance from the Supreme Court. On August 31, 2006, the Supreme Court responded. An Order was issued providing all judges, prosecutors, victim service officers, probation and parole officers, and court personnel statewide access of youthful offender and juvenile delinquency records of any person subsequently charged with a felony offense, for the sole purpose of completing the worksheets required for implementation of the sentencing standards. It is specifically provided that these records shall be made available to the designated persons without requiring a special hearing or issuance of an order by the court of adjudication.

### **Transition Centers**

Since 2003, the Alabama Sentencing Commission has advocated the creation of transition centers in Alabama to assist in the successful re-entry of offenders from the confines of imprisonment back into the free world. The Commission has recognized that persons confined for a period of time become institutionalized and their life skills have often diminished during their incarceration. This is especially true of ex-prisoners who are released into a world often vastly different from the world they left when first incarcerated, leading to further criminal conduct and subsequent incarceration. For these reasons, the Commission recognized the need for preparing incarcerated offenders for release into the free world. The Board of Pardons and Paroles has accepted the challenge and now provides two transition centers as another step in establishing a continuum of sanctions in Alabama. These transition centers, originally designed as a stepping stone from prison to the free world, are now used not only for that purpose, but also as a “last step” before prison for some women offenders for whom every other avenue has failed. The two transitions centers are the women’s L.I.F.E. Tech in Wetumpka and the men’s L.I.F.E Tech facility in Thomasville.

The women’s facility, designed to help reduce the crowded conditions at Tutwiler Prison, as well as to assist women transition from prison to the free world, originally focused on accepting incarcerated women who were not ready for parole. Since the inception of that facility, its mission appears to have changed.

	<b>Completed Program</b>	<b>Failed to Complete</b>	<b>Current Residents</b>	<b>Total</b>
Parolees	401	112	30	610
Probationers	255	87	106	498
Total	656	199	136	1,108

In the past, the majority (60%) of residents at the women's L.I.F.E. Tech facility were parolees. However, parolees now account, as of May 25, 2007, for only 22% of the current residents. It is recommended that the Board of Pardons & Paroles, in conjunction with the Department of Corrections, conduct a thorough study of the women incarcerated at Tutwiler to find those offenders who could benefit from the intensive L.I.F.E. Tech programs to further ease the crowded conditions at that facility and to provide released women with the skills necessary to successfully transition into the free world.

The women's facility continues to offer a successful program to those who complete the courses offered. To date, only 2.6% of the L.I.F.E Tech women have been convicted of a new offense after leaving the facility. This compares very favorably with a recidivism rate of over 25% for those who are released without the benefits of the program.

The men's facility at Thomasville is still too new to evaluate. That facility came on line April 2, 2006 and has a current enrollment of 231. The recidivism rate of the early graduates is almost double that of the women, but still lower than those released without the benefits of the program.

Alabama must continue to work to provide a true continuum of punishment including more opportunities for successful reentry into the free world after prison. The safety of the public depends on the successful re-entry of these individuals. The L.I.F.E Tech programs must continue to expand to offer successful re-entry to all offenders who can take advantage of these opportunities.

### **Technical Violator Centers**

In FY 2006, more than 425 offenders were returned to prison for technical parole violations (no new offense committed) and 1,056 for technical violations of probation. Technical violations include violating a condition of parole or probation other than the commission of a new offense. These violations include matters such as failure to report to a parole or probation officer in a timely fashion, failing drug tests, violations of curfew, late reporting, failing to notify of address change, etc. The violations indicate an inability to comply with rules and a lack of structure in the lives of the offenders. The violations are often more indicative of the offender's danger to him/herself than to the community. To address these issues, many states are now implementing technical violator centers, special programs for addressing these issues. Such centers in Alabama could have reduced prison admissions by almost 1,500 in 2006.

The Sentencing Commission continues to recommend the creation of technical violator centers in Alabama, not only because of prison crowding, but also because the needs of

these offenders can be more effectively addressed in centers aimed specifically at the problems these offenders face. Again this is an issue of public safety. If these issues can be resolved with a 60 to 90 day program at a technical violator center, then Alabama does not need to waste scarce prison resources on these offenders.

### **Special Parole Board**

In Act 2003-415, the Legislature created a second branch of the Board of Pardons and Paroles to assist the original Board in hearing parole dockets to clear up backlogs in those dockets. By statute, the terms of the new board members ended on September 30, 2006. While there were some proposals to continue the second board to hear additional cases, the Legislature refused to extend the original terms due to the reduced number of parole eligible offenders. The special board was effective in increasing the number of inmates considered for parole, helping to alleviate some of the immediate crowding of state prisons, but this success was short-lived. While paroles continue, this release mechanism alone cannot be expected to stabilize the prison population.



## **X. SENTENCING STANDARDS**

### **A. WHAT**

In compliance with the directives included in the Sentencing Reform Act of 2003, the Alabama Sentencing Commission developed voluntary sentencing standards or recommended sentences for the most frequent felony crimes of conviction. These recommended sentences will provide judges with additional information and direction in lieu of the wider ranges currently available under existing statutory law.

The recommendations or “standards” as they are called are voluntary, non-appealable, historically based, time imposed, sentencing recommendations developed for 26 felony offenses, representing 87% of all felony convictions and sentences imposed in Alabama over an approximate five-year period from October 1, 1998 through May 31, 2003. The standards are recommended sentence ranges and dispositions for the covered offenses that recognize the impact of key factors normally considered by judges in imposing sentences.

The standards represent the “normal” case containing the recognized sentencing factors. Of course, other factors will undoubtedly exist in about 25% of sentenced cases, in which judges are expected to take those factors into consideration and impose either a harsher or more lenient sentence than that recommended. It is expected that use of the standards will result in more informed sentencing, greater uniformity in sentencing and the elimination of unwarranted sentencing disparity.

The Sentencing Standards were approved by the Legislature during the 2006 Legislative Session and these standards became effective October 1, 2006.

### **B. WHY**

The Alabama Legislature has recognized a need for sentencing reform in this state. A study conducted by the Vera Institute of Justice, found that there was a 326% increase in the rate of incarceration in Alabama between 1979 and 2000.

Alabama had twice as many property crimes admissions per 100 arrests between 1983 and 1992 as the national average. Drug offenders represent the largest percentage of offenders entering Alabama prisons.

Data available through 2000 in regards to incarceration rates (representing the number of sentenced prisoners per 100,000 population), indicates that Alabama’s incarceration rate ranked well above the national average and fifth among all 50 states surveyed.

Recognizing the overcrowding of our prisons in Alabama, and the demands on our public resources, the Alabama legislature has created the Alabama Sentencing Commission to recommend changes in Alabama’s criminal justice system. Such recommendations must, among other things, secure public safety, provide certainty and fairness in sentencing,



avoid unwarranted sentencing disparities, and prevent prison overcrowding and premature release of prisoners.

The Sentencing Commission is charged with recommending changes which “maintains judicial discretion and sufficient flexibility to permit individualized sentencing as warranted by mitigating and aggravating factors.”

After studying the work of sentencing commissions from around the country, the Alabama Commission decided to recommend Voluntary Sentencing Guidelines for use by trial judges in this state. The guidelines will provide the judges information needed to make informed sentencing decisions in the exercise of their discretion.

These are Voluntary and Non-appealable sentencing guidelines and are nothing like the mandatory or presumptive guidelines adopted by some states and the federal courts.

### **C. WHEN**

The Initial “Time Imposed” Sentencing Standards became effective October 1, 2006. From May – September of 2006, the Sentencing Commission conducted 30 regional workshops instructing trial judges, probation officers and defense attorneys in the completion of worksheets prior to implementation of the standards. in October of 2006. These worksheets will enable judges to score the offender’s criminal history and arrive at a recommended sentence. These standards include two sets of worksheets – one to determine the sentence disposition (prison or non-prison) and the other for the length or duration of the sentence.

The second set of standards, the “Time Served” standards when approved by the Legislature, will implement Truth-in-Sentencing in Alabama, adopting a system which 1) sets a minimum mandatory time a defendant will have to serve; 2) will adopt “bad time” in lieu of “good time” for additional time to be added on to a sentence for disciplinaries; and 3) require one year of post-incarceration supervision for every felony offender leaving prison. The system will alter “parole and good time” as we know it, but will not abolish the Parole Board.

### **D. Major Issues Regarding the Initial Standards and Worksheets**

#### **1. Sentencing Standards Must Be Considered**

The Sentencing Standards are voluntary and nonappealable, however, the Sentencing Reform Act requires that they be *considered* for all worksheet offenses.

#### **§ 12-15-35 (b)**

The trial court shall review the sentencing standards worksheet and consider the suitability of the applicable voluntary sentencing standards established pursuant to this article. In imposing sentence, the court shall indicate on the record that the worksheet and applicable sentencing standards have been reviewed and considered.”

- 2. The standards apply to all covered offenses *sentenced* after the Act's effective date – October 1, 2006.**

§ 12-25-34 (a)(3)

“The initial voluntary sentencing standards based on sentences imposed shall apply to convictions for felony offenses sentenced on or after the effective date of this act and committed before the effective date of the truth-in-sentencing standards.”

- 3. If the standards are followed, additional enhancement penalties, i.e. weapons, 3-mile radius, HFO statutes should *not* be imposed.**

§ 12-25-34 (c)

“Voluntary sentencing standards shall take into account and include statewide historically based sentence ranges, including all applicable statutory minimums and sentence enhancement provisions, including the Habitual Felony Offender Act, with adjustments made to reflect current sentencing policies. *No additional penalties pursuant to any sentence enhancement statute shall apply to sentences imposed based on the voluntary sentencing standards.*”

- 4. The initial sentencing standards, effective October 1, 2006, are not Truth -In - Sentencing Standards.**

**5. Use of Worksheets**

- If worksheet offense, defendants charged with aiding and abetting included
- Not attempts, conspiracy or solicitations (even attempted murder and drug crimes that carry the same punishment)
- Not drug trafficking offenses
- Not child (under the age of 12) sex offenses
- Not capital murder
- Not Mandatory Life Without Parole Offenses
- Not YO or Juvenile

**Hard Copies**

- *Both* worksheets must be completed in full and submitted to the Commission
- Copies of Court orders must be attached

- Should not be made a part of the court record/file since YO and JU information is included
- Court Clerk responsible for submission
- If noncompliant, request that judge provide reason(s)

## 6. Sentencing Factors

### Prior Incarcerations

Count juveniles sentenced to DYS as prior incarceration

Count only *unsuspended* sentence imposed of 1 year or more and less than 1 year

### Weapon

If weapon or dangerous instrument used or threatened (or possessed on entry) weapon scored even if offense pled down and not element of offense.

## 7. Compliance

### Prison Recommendation - Compliance

- Must follow in-out recommendation and sentence length recommendation
- Splits must be within both ranges – Total imposed sentence and time to serve on split
- Reverse Splits – Compliant if within sentence range
- Community Corrections at DOC

### Prison Recommendation - NonCompliance

- Noncompliant if entire sentence is suspended
- Noncompliant if Life sentence is imposed

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### NonPrison Recommendation - Compliance

- All of sentence suspended and defendant placed on probation
- Split if sentenced to jail
- Work Release/Jail
- Community Corrections as a condition of probation

## 8. Electronic Worksheets

Instructional Manual and pdf worksheet forms on Sentencing Commission website <http://sentencingcommission.alacourt.gov>

E-worksheet website <http://worksheets.alacourt.gov> contains interactive functionality worksheets that can be obtained from the login page by anyone that has not been designated the official worksheet preparer.

The on-line cases and worksheets *are only available to judges and those designated by the judge as official preparers.*

If designated preparer, go to the login page and click the link Click here for more information about E-Worksheets. Next, click the link Request a New User Account and register by completing the form.

Enter Identifying information

After this information is received by our analyst and she verifies that you have been designated as an official preparer by the judge, you will be assigned a password and notified by e-mail.

*Statewide YO and Juvenile delinquency adjudication information is available from this website for purposes of completing the worksheets only. This information is confidential and may not be disclosed to the general public. Unauthorized disclosure is a criminal offense.*

### Advantages of Using the Electronic Worksheets as Official Form

1. Copies of the worksheets are not required to be mailed to the Sentencing Commission.
2. Keeping a copy of the worksheet is not required.
3. No court order is required to be sent to the Commission.
4. Can be distributed by e-mail to the defense attorneys, prosecutors, probation officers, judge, etc.
5. PDF file can be saved to computer and e-mailed as an attachment.
6. Statewide YO and JU information is available on defendants.
7. Prior Conviction information from AOC and CJIC available (not as comprehensive as NCIC).
8. Points added automatically to obtain scores - avoiding mathematical errors.
9. Recommended sentence range automatically populated, without requiring reference to standards charts.
10. Similar information and answers for same factors are automatically populated from In/Out worksheet to Sentence Length worksheet.
11. Identifying information on defendant through NameMaster available through a mouse click.
12. Electronic PSI instantly available.
13. Entry of sentence by Clerk will populate actual sentence entered on worksheets.

14. Actual sentence and recommended sentence will be compared. If noncompliance, an automatic e-mail will be sent to the sentencing judge requesting reason(s) for departure.
15. Savings in time, paper, supplies and postage.

*\*If official electronic worksheet is completed online, do NOT send a copy of the worksheet to the Commission.*

#### Problem Areas With Manual Forms

- Sending in only one worksheet
- No court order attached (Clerk's responsibility)
- Premature Submission – Form sent in before sentence is final, i.e. probation hearing scheduled
- Copies sent in rather than original
- Completed Case Information not provided
- Information is illegible
- Failure to circle the most serious offense at conviction
- Failure to list additional counts and/or cases
- Failure to provide name and title of worksheet preparer
- Not including county code in casenumber

## **XI. Crime Bills That Passed During the 2006 & 2007 Regular Sessions**

### **A. Crime Bills That Passed During the 2007 Regular Session**

**Act # 2007-457**

**H.B. 223**

**§ 13A-5-9.1**

**HFOA /Kirby Resentencing by Circuit Judge**

**Effective June 14, 2007**

This Act amends § 13A-5-9.1 of the *Code of Alabama 1975*, relating to the resentencing of nonviolent offenders sentenced under the Habitual Offender Act, to provide that where the original sentencing judge is no longer in office, the presiding circuit judge may appoint any circuit judge to consider a *Kirby* petition for resentencing of each nonviolent convicted offender based on evaluations performed by the Department of Corrections and approved by the Board of Pardons and Paroles and submitted to the court.

**Act # 2007-391**

**S.B. 265**

**§ 12-25-2**

**Videotaped Depositions of Child Victims/Witnesses**

**Effective October 1, 2007**

This Act amends § 12-25-2 and § 12-25-3 of the *Code of Alabama 1975*, relating to videotaped depositions of a victim or witness under 16 years of age in prosecutions under §15-25-1 (any criminal prosecution for a physical offense or sexual offense or sexual exploitation involving a child under 16 years of age). The amended Act provides for videotaped deposition of a victim or witness under the age of 16 upon motion of the DA or Attorney General for good cause shown and after notice to the defendant. The main provisions of this Act is that it prohibits the presence of the defendant and restricts who may be present during the deposition to the prosecuting attorney, defense attorney, persons the judge considers contributes to the child's well-being and who has dealt with the child in a therapeutic setting regarding abuse, or other persons such as parents or legal guardians authorized in the judge's discretion, and provides that only the prosecuting attorney, the court, or the defense attorney may question the child victim or witness. Section 12-25-3, as amended, provides for the use of closed circuit equipment, out of the presence of the defendant, to present the testimony of the child during trial. The amended sections do not apply to a defendant who is an attorney pro se.

The new amended portions of these statutes provide that:

1) When necessary, the operator of the videotaping equipment may also be in the room. Closed circuit equipment operators are authorized in the room.

2) Only the court, the prosecuting attorney, and the attorney for the defendant can question the child victim or witness during video taped depositions or closed circuit testimony. For videotaped depositions, the defendant must be provided access to view the testimony out of the child's presence during the testimony of the child, and must be allowed to communicate with his or her attorney by any appropriate election method.

3) During the child's testimony by closed circuit equipment, the defendant, the judge, and the jury must remain in the courtroom. The video feed showing the child must remain visible to the defendant, the judge, and the jury at all times during the testimony and cross-examination of the child victim or witness. The judge and the defendant must be allowed to communicate with the attorneys in the room where the child is testifying by any appropriate electronic method.

4) The party making the motion that the testimony shall be by closed circuit equipment must make all the necessary arrangements regarding the equipment and its operation during the course of the proceeding.

“(i) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time. The testimony shall be limited to purposes of identification only.”

“(j) The provisions of this section shall not apply if the defendant is not represented by an attorney.”

### **LOCAL ACTS**

**Act # 2007-450**  
**H.B. 54**

**Sex Offender Residence**  
**Effective October 1, 2007**

This Act applies only to Jefferson County, and prohibits more than one adult or unrelated juvenile criminal sex offender from establishing a residence or other living accommodation in a residence where another criminal sex offender resides whose name appears on the Jefferson County Sheriff's published sex offender list. The bill defines a criminal sex offender as an offender whose name appears on the Jefferson County Sheriff's official published sex offender list. The Act's provisions do not apply to sex offenders that are owners or lessees or to person that are the spouse or child of an owner or lessee, since these are expressly excluded. The bill further provides that an owner or lessee of the property who knowingly, willingly, or intentionally violates this law shall be fined \$5,000 for each violation. The fines are to be distributed to the Birmingham Police Department Sex Offender Unit.

**Act # 2007-269**  
**H.B. 772**  
**§§ 13A-7-5, 13A-7-6**

**Arrest Powers for Montgomery Community**  
**Corrections Program Employees**  
**Effective June 6, 2007**

This Act provides that the directors and employees of the Montgomery Community Corrections Program may have the powers of peace officers and are authorized to arrest defendants assigned to their program, or any person committing a crime in any program facility. They are also authorized to serve search warrants in performance of duties the same as deputy sheriffs. However, in order to have these powers, the employee or director must hold a current certification from the Alabama Peace Officers' Standards

and Training Commission, complying with the minimum standards currently in effect relating to state law enforcement officers.

**Act # 2007-332**  
**H.B. 779**

**Colbert County PreTrial Diversion Program**  
**Effective June 6, 2007**

This Act establishes a pretrial diversion program for Colbert County, the 31<sup>st</sup> Judicial Circuit. The program shall be under the direct supervision and control of the district attorney. The Act provides that persons charged with certain non-violent felonies and misdemeanors are eligible to apply for the program. The Act provides that admittance to the program is appropriate if the offender appears to pose no substantial risk to the safety and well-being of the community; it appears the offender is not likely to be further involved in criminal activity; the offender will likely respond to rehabilitative treatment, etc.

The offender must waive, in writing, and contingent upon the successful completion of the program, his or her right to a speedy trial, and the offender must apply for the program no later than 21 days after his or her first appearance, arraignment, or issuance of a traffic citation. All applicants shall pay a nonrefundable application of \$100, and if admitted, shall pay a fee based on the type of offense (up to \$750 for felony offenses, up to \$500 for misdemeanors, etc.) As a condition of being admitted into the program, the district attorney may require the offender to agree to participate in education courses; financially support his or her children; refrain from the use of alcohol or drugs; maintain or seek employment; pay restitution, as well as court costs and fines, etc. The conditions will be agreed to, in writing, between the offender and the district attorney.

## **B. Crime Bills That Passed During the 2006 Regular Session**

### **Alabama Sentencing Commission Bills**

**Act # 2006-312**  
**§§ 12-25-31.1, 12-25-24, 12-25-34.1**

**Sentencing Standards**  
**Effective October 1, 2006**

This Act adopts voluntary sentencing standards with appropriate work sheets for 26 felony offenses. These recommended sentences provide judges with additional information and direction in lieu of the wider ranges currently available under existing statutory law.

The recommendations, or “sentencing standards” as they are called, are voluntary, non-appealable, historically based, time imposed, sentencing recommendations developed for 26 felony offenses, representing 87% of all felony convictions and sentences imposed in Alabama over an approximate five-year period from October 1, 1998 through May 31, 2003. The standards are recommended sentence ranges and dispositions for the covered offenses, developed utilizing key factors normally considered by judges in imposing sentences.



The Commission believes that judges will follow the sentencing recommendations in about 75% of sentenced cases. The standards represent the “normal” case containing recognized sentencing factors. Of course, other factors will undoubtedly exist in about 25% of sentenced cases, in which judges are expected to take those additional factors into consideration and impose either a harsher or more lenient sentence than recommended. Preliminary testing of the standards has indicated that use of the standards will produce the desired result, i.e., greater uniformity in sentencing and the elimination of unwarranted sentencing disparity.

This legislation is virtually the same as the sentencing standards bill that was introduced during the 2004 and 2005 Regular Sessions that passed the House both years, and was in a position to pass on the last night of the 2005 Regular Session. Some minor changes have been made to the bill, including a new implementation date for the sentencing standards and some minor improvements in the standards themselves to clarify definitions and recommendations. In addition, a provision was added to require filing of the standards with the Clerks of the Senate and House, as well as the Clerk of the Alabama Supreme Court.

**Act # 2006-297**  
**§ 13A-8-4**

**Theft of Property 2<sup>nd</sup>**  
**Effective April 4, 2006**

This Act corrects a mistake made in 2004, when the threshold for Theft of Property 2nd Degree was inadvertently changed back to the pre-2003 level in a bill changing the words “horses” and “mules” to “equine” and “equidae.” The pre-2003 statutory language was used in making the amendment. This change resulted in an omission for theft of property valued from \$1,000 to \$2,500.

**Act # 2006-198**  
**§§ 13A-7-5, 13A-7-6**

**Burglary 1<sup>st</sup> and 2<sup>nd</sup>**  
**Effective June 1, 2006**

This Act amends §§ 13A-7-5 and 13A-7-6 of the *Code of Alabama 1975*, relating to Burglary in the 1st and 2nd degrees, requiring that an offender either be armed with a deadly weapon upon entry into a dwelling or building or use or threaten the immediate use of a deadly weapon in order to be convicted of the higher offense. It is specifically provided that, if the deadly weapon or dangerous instrument is one of the items stolen in the burglary, the crime does *not* involve the “use” or “threatened use” of the deadly weapon or dangerous instrument.

**Act # 2006-197**  
**§§ 13A-5-11, 13A-5-12**

**Maximum Fine Increase**  
**Effective June 1, 2006**

The fines authorized for criminal offenses have not been adjusted since the Criminal Code was originally codified back in the 1970’s. This Act amends §§ 13A-5-11 and 13A-5-12 of the *Code of Alabama 1975*, to increase (based on the inflation index) the maximum amount of fines authorized to be assessed upon one convicted of a felony,

misdemeanor, or state law violation. If passed, the amendments would allow the judge to retain his/her discretion to impose any lesser fine amount and would simply authorize the imposition of a larger fine in appropriate cases.

The new maximum authorized fines are comparable to those authorized in Tennessee, Georgia, and Virginia as well as to the fines imposed for new offenses in Florida, Mississippi, and South Carolina.

**Act # 2006-218  
§ 13A-5-5**

**Pre-/ Post-Sentence Investigation Reports  
Effective March 10, 2006**

Under prior law, pre-sentence investigation reports on convicted felony offenders were required only upon motion of a party or the court and these reports are provided in written or electronic form. These reports contain information essential to the supervision of probationers and the classification of prison-bound offenders. The reports also contain vital information for maintaining current data on convicted offenders on which policy decisions can be made for improving Alabama's criminal justice system. This Act requires either the filing of *post-sentence or* pre-sentence reports, to avoid case processing delays, and also requires such reports to be completed in electronic format.

**Act # 2006-654  
§ 32-5A-191**

**DUI Amendment, Out-of-State Convictions  
Effective April 28, 2006**

The appellate courts had interpreted Alabama's DUI statute as prohibiting the use of prior DUI convictions from out-of-state for the purpose of enhancing punishment when a person was subsequently convicted for violating Alabama's DUI statute. Act 2006-654 amended Alabama's DUI statute to specifically authorize the use of out-of-state convictions for enhancements under § 32-5A-191, Alabama's DUI Law. As substituted, HB 117 included a provision under new subsection (o) referencing prior convictions occurring within a 5 year period for enhanced punishment. It reads, in its entirety, as follows: "(o) A prior conviction within a five-year period for driving under the influence of alcohol or drugs from this state, a municipality within this state, or another state or territory or a municipality of another state or territory shall be considered by a court for imposing a sentence pursuant to this section." Subsection (f) still limits the use of a prior conviction to those occurring within a five year period, however, subsection (g) relating to third convictions and subsection (h) relating to fourth or subsequent convictions, have no limitation period specified therein. Whether this imposes a five year limitation on the use of all prior convictions will be an issue which will ultimately have to be decided by the courts. In addition, to correct drafting errors in 2006-298 omitting reference to commercial motor vehicles, Act 2006-654, specifically repealed Act 2006-298.

## **Other Crime Bills**

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**Act # 2006-204**

**§§ 26.15-2, 26-15.3.2**

**Crime; Chemical Endangerment; Exposure; Children**

**Effective June 1, 2006**

Creates the new crimes of Chemical Endangerment of Child, punishable as follows:  
Knowingly, recklessly or intentionally causing or permitting a child to be exposed to, ingest or inhale or have contact with a controlled substance, chemical substance or drug paraphernalia as defined – Class C Felony

Exposure which results in serious physical injury – Class B Felony

Exposure that results in the death of the child – Class A felony

The punishment provided in this Act controls unless other provision of law provides a greater penalty or longer term of imprisonment.

**Act # 2006-112**

**§§ 13A-12-190 through  
13A-12-194, 13A-12-196,  
13A-12-197**

**Obscene Material & Minors**

**Effective June 1, 2006**

Provides that each depiction (visual depiction is defined as portrayal, representation, illustration, image, likeness or other thing that creates a sensory impression, whether an original duplicate or reproduction) of an individual less than 17 years of age would constitute a separate offense for each single visual for convictions of child pornography pursuant to §§13A-12-191, 192, 196 or 197. In addition, each depiction of any individual under 17 shall be a separate offense for knowingly filming, printing, recording, photography or producing visual depictions of children under 17 years of age in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, genital nudity, or other sexual conduct.

**Act # 2006-148**

**§§ 13A-8-192, 13A-8-198,  
13A-8-199**

**Identity Theft; Increase Penalties**

**Effective April 5, 2006**

Amends §13A-9-102 to eliminate limitation that identity theft must result in a financial loss of greater than \$500 and all references to prior convictions and designation of identity theft in the first degree. Identity theft remains classified as a Class C felony. In addition, a provision is included establishing a seven year statute of limitation and provides an exception for obtaining the identity of another for the sole purpose of obtaining alcoholic beverages, tobacco, or another privilege denied to minors.

**Act # 2006-303**  
**§§ 13A-3-20, 13A-3-23**

**Crime, Justifiable Use of Deadly Force**  
**Effective June 1, 2006**

Authorizes the use of deadly force against a person who is in the process of forcefully entering, or who has unlawfully and forcefully entered a dwelling, residence, occupied vehicle, or federally licensed nuclear power facility or is attempting to remove or has forcefully removed a person against his will from same. There are exceptions to grant of authority, i.e. when action is use of force is unlawful; where the person is a lawful resident, owner or lessee and there is no existing domestic violence injunction; the person sought to be removed is a child or grandchild or is otherwise in lawful custody or under guardianship of person seeking removal, law enforcement officers., etc..

**Act # 2006-185**  
**§§14-6A-30 through**  
**14-6A-39**

**Combined Jail Facilities**  
**Effective June 1, 2006**

Authorizes two or more municipalities to establish a regional jail authority and operate regional jail facilities.

**Act # 2006-311**  
**§ 32-5A-154**

**Passing School/Church Bus – New Penalties**  
**Effective October 1, 2006**

Increases penalties for illegally passing a school or church bus and makes 4<sup>th</sup> or subsequent conviction a Class C felony, punishable by imprisonment and \$1,000 to \$3,000 and one year revocation of driver's license. Punishment is provided as follows for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> violations:

1 <sup>st</sup> conviction	Fine \$150 -300
2 <sup>nd</sup> conviction	Fine \$300 – 500 fine, 100 hours of community service and 30 day suspension of driver's license.
3 <sup>rd</sup> conviction	Fine \$500-1,000, 200 hours community service and 90 day driver's license suspension.

It is specifically provided that there are no lesser included offenses for these violations, the HFOA does not apply for fourth and subsequent convictions and that all fines are to be sent to the State General Fund and earmarked for the agency that enforces the law.

**Act # 2006-423**  
**§ 13A-10-1**

**Crime; Obstructing Volunteer Firemen**  
**Effective July 1, 2006**

This bill amends §13A-10-1 to include members of volunteer fire departments within the definition of “fireman” thereby apply the crime of Obstructing Governmental Operations under §13A-10-2, a Class A misdemeanor, to actions taken against of volunteer firemen.

**Act # 2006 -419**

**Crime: Homicide “Person” Include Unborn  
Child – The Brody Act  
Effective July 1, 2006**

**§ 13A-6-1**

Amends § 13A-6-1 to define person as related to criminal homicides or assaults to include an unborn child at every stage of gestation, regardless of viability.

**Act # 2006-427**

**Crime; Murder If Firefighter Dies; Arson  
Effective July 1, 2006**

**§ 13A-6-2**

Amends §13A-6-2 relating to the crime of murder (Class A felony) to include the death of a “qualified governmental or volunteer firefighter or other public safety officer” who dies while performing his or her duty as a consequence of the crime of arson.

**Act # 2006-353**

**Crime, Hog and Canine Fighting  
Effective July 1, 2006**

**§ 13A-12-6**

Creates the crime of hog and canine fighting and provides that it shall be unlawful to organize or conduct any commercial or private event which displays the fighting between one or more domestic or feral canines and feral or domestic hogs. First offenders are punished as a Class A misdemeanor, Second and subsequent convictions are punished as a Class C felon. The Act requires a judge to inform a defendant of the enhanced penalty for subsequent convictions after a first violation.

**Act # 2006-508**

**Terrorist Act; Endanger Food & Water Supplies  
Effective July 1, 2006**

**§§ 13A-10-151, 13A-10-170,  
13A-10-171**

Creates the crime of endangering the food or water supply, A Class B felony.

**Act # 2006-623**

**Child Restraints, Criteria/Fine  
Effective July 1, 2006**

**§ 32-5-222**

Requires child passenger restraints for children, specifically mandating the use of booster seats for children under 8 years of age unless the child weighs 65 pounds or more or is four feet nine inches in height or taller. Each violation will result in a \$25 fine that the court can dismiss upon proof of acquisition of an appropriate child passenger restraint. A specific provision is included requiring state, county and municipal police departments to maintain statistical information on traffic stops of minorities pursuant to this bill and to report that information monthly to the Office of the Attorney General and the Department of Public Safety.

**Act # 2006-575**

**Crime, Sex Offenders: Victim Under 12 years of Age**

**§§ 13A-6-66, 13A-6-69.1**

**Effective July 1, 2006**

Creates the crime of sexual abuse of a child less than 12 years old, punishable as a Class B felony. This offense is now made a more severe offense than sexual abuse in the first degree, Class C felony.

**Act # 2006-547**

**Backing of Arrest Warrants for Execution in Other Counties**

**§§ 15-10-10, 15-10-13**

**Effective July 1, 2006**

Eliminates the requirement that arrest warrants to be executed in another county must be “backed” by local magistrate or judge. Appears to require assistance of local law enforcement by the following provision: “The law enforcement officer shall summon the assistance of local law enforcement if possible to assist in making the arrest and only then may exercise the same authority as the officer possesses in his or her own county or jurisdiction.”

**Act # 2006-531**

**Crime: Child Abuse: Enhanced Punishment**

**§ 26-15-3**

**Effective July 1, 2006**

Designates the crime of child abuse pursuant to §26-15-3 as a Class C felony. Under existing law it is unclassified and provides for punishment in the penitentiary for not less than one year, rather than one year and a day, up to 10 years. This change will authorize application of the Habitual Felony Offender statute for repeat offenders.

**Act # 2006-580**

**Crime: Home Repair Fraud**

**§§ 13A-9-110 through 13A-9-115**

**Effective July 1, 2006**

This bill creates the crime of home repair fraud and provides that the first violation is a Class A misdemeanor and second or subsequent convictions are punishable as Class C felony offenses. Restitution is required to be ordered by the judge as a condition of probation, either within a specified period of time or in specified installments. It is specifically provided that “[t]he order shall not be enforceable during the period of imprisonment unless the court expressly finds that the defendant has assets to pay the amounts ordered at the time of sentencing. Intentional refusal to make restitution pursuant to a court order may be considered as grounds for revocation of the person’s probation or suspension of sentence.”

**Act # 2006-565**  
**§ 13A-6-21**

**Assault; Healthcare Workers**  
**Effective July 1, 2006**

Amends §13A-6-21 relating to the crime of assault in the second degree, a Class C felony offense, to include the assault of a health care worker or other person employed by or practicing at certain health care facilities which results in physical injury. Home health care workers that are working in private residences are expressly excluded, as are assaults by patients who are impaired by medication.

**Act # 2006-544**  
**§§ 15-22-90 through 15-22-92**

**Pardon of Persons – Rosa Parks Act**  
**Effective July 1, 2006**

This bill would provide a pardon to a person convicted of a state law or municipal ordinance the purpose of which was to maintain racial separation or racial discrimination. It requires that a pardon be granted within 42 days from submission of the application unless it is objected to by the state. A separate procedure is authorized for applying for a pardon by filing a sworn affidavit. In instances where the person to be pardoned is dead, the bill provides that an application may be filed by his or her relatives or any interested party. A specific provision for expungement of records of conviction is included for those granted a pardon. An expungement form is to be provided by the Administrative Office of Courts.

**Act # 2006-560**  
**§ 13A-12-281**

**Eliminate Juveniles, Demand Reduction Assessment**  
**Effective April 25, 2006**

Amends §13A-12-281 to delete juvenile delinquents from the additional penalty required to be assessed for drug offenses. First offenders must now be assessed an additional penalty of \$1,000; \$2,000 for second and subsequent offenses.

**Act # 2006-539**  
**13A-11-61.1**

**Discharge Firearm/School Bus or building**  
**Effective July 1, 2006**

Creates the new crimes, discharging a firearm into an occupied school bus or school building (Class B felony) and discharging a firearm into an unoccupied school bus or school building (Class C felony). A specific provision is included providing that if any other law prescribes the same conduct that the law carrying the more serious penalty will be applied.

**Act # 2006-585**  
**§ 13A-11-17**

**Disrupting Funeral/Funeral Procession**  
**Effective July 1, 2006**

Creates the crime of disrupting a funeral or a memorial service and provides that the first offense shall be a Class A misdemeanor and a second or subsequent conviction will be punished as a Class C felony.

**Act # 2006-533****Municipality Responsible for Expense of Juvenile in Detention****§ 12-15-10****Effective April 21, 2006***But does not apply to Juvenile in detention on the effective date*

Applies to juveniles charged and/or detained for violation of a municipal ordinance that is NOT based on state criminal statute adopted by the city as a municipal ordinance violation. In these limited situations, the municipality is required to reimburse the county for actual costs of housing, maintenance and medical expenses of those juveniles held in a facility utilized by the county for housing juveniles.

**Act # 2006-561****Theft of Property 1<sup>st</sup> Degree – Expand Definition****§ 13A-8-3****Effective July 1, 2006**

Amends the TOP 1<sup>st</sup> statute (Class B felony) to include theft of property (the cumulative value within 180 day period, valued not less than \$1000) resulting from a common plan or scheme by one or more persons where the object of the plan or scheme is to sell or transfer the property to another person or business who knows that the property is stolen. It is provided that prosecution can be in either county where the theft occurred or where the property was disposed.

**Act # 2006-622****Commercial Driver License Not Eligible Diversion Program****§ 36-6-49.23****Effective July 1, 2006**

Specifically prohibits deferred prosecution or participation in a diversion program for any commercial driver who is charged with a traffic violation.

**Act # 2006-572****Person Charged/Rape Tested for HIV & STDs****§§ 15-23-100 through  
15-23-104****Effective July 1, 2006**

Allows an alleged victim of rape, sodomy, or sexual misconduct to request that the defendant be tested for sexually transmitted diseases. The test is initiated by the district attorney filing a motion with the court. An order is then issued requiring the person charged to submit to a test. The Act provides that upon the filing of a motion “the court shall order the person charged to submit to testing if there is probable cause to believe that the person charged committed the crime of rape, sodomy, or sexual misconduct and the transmission of body fluids was involved.”

In the event the test result is negative, the Act provides that “the court shall order the person to submit to any follow-up tests at the intervals and in the manner as shall be determined by the State Board of Health. If the test result is positive, the defendant is to receive post-test counseling and, at the request of the alleged victim or his/her parent or guardian, support services and appropriate health care, and testing shall be provided to



the victim. The test results are confidential and are only to be provided to the alleged victim, parent or guardian of the alleged victim, the attending physician of the alleged victim, and the person tested. A violation of the confidentiality provisions is a Class C misdemeanor.

#### **LOCAL ACTS – PRE-TRIAL DIVERSION**

*Many counties have implemented District Attorney Pre-trial Diversion Programs by passage of local legislation. There is no general statute governing procedure, types of eligible offenders, expungement of records, case disposition, assessment of fees or ensuring judicial involvement. With the passage of Act 2007-332, there are now 13 district attorney pre-trial diversion programs operating pursuant to local acts, including the four local acts that passed during the 2006 Regular Session authorizing the establishment of pre-trial diversion programs in the 1<sup>st</sup>, 4<sup>th</sup>, 19<sup>th</sup> and 21<sup>st</sup> judicial circuits.*

**Act # 2007-332  
H.B. 779**

**Colbert County PreTrial Diversion Program  
Effective June 6, 2007**

This Act establishes a pretrial diversion program for Colbert County, the 31<sup>st</sup> Judicial Circuit. According to the Act's provisions, the program will be under the direct supervision and control of the district attorney. The Act provides that persons charged with certain non-violent felonies and misdemeanors are eligible to apply for the program. Admittance to the program is authorized if the offender appears to pose no substantial risk to the safety and well-being of the community, is not likely to be further involved in criminal activity, and will likely respond to rehabilitative treatment..

The offender must waive, in writing, and contingent upon the successful completion of the program, his or her right to a speedy trial, and the offender must apply for the program no later than 21 days after his or her first appearance, arraignment, or issuance of a traffic citation. All applicants shall pay a nonrefundable application of \$100, and if admitted, shall pay a fee based on the type of offense (up to \$750 for felony offenses, up to \$500 for misdemeanors, etc.) As a condition of being admitted into the program, the district attorney may require the offender to agree to participate in education courses; financially support his or her children; refrain from the use of alcohol or drugs; maintain or seek employment; pay restitution, as well as court costs and fines, etc. The conditions will be agreed to, in writing, between the offender and the district attorney.

**Act # 2006-595  
SB 536 Lindsey**

**1<sup>st</sup> Circuit DA Pre-Trial Diversion Program  
Effective April 26, 2006**

Authorizes the District Attorney of the 1<sup>st</sup> (Choctaw, Clarke, and Washington Counties) Judicial Circuit to establish a pretrial diversion program and assess unlimited fees for program participation. There is authority for waiver of the fees based on indigency, as determined by the District Attorney. Those eligible to apply for admission to the program are offenders charged with traffic offenses, property offenses, offenses not involving serious physical injury to the victim or victims under 14 years of age,

misdemeanors and violations. Excluded are offenses of drug trafficking or distribution of drugs, child abuse, elderly abuse, sex offenses, Class A felonies, offenses involving serious injury or death. The Act includes a specific provision which makes all of the district attorney's pretrial diversion program records confidential. For those that successfully complete the program, charges against the offender are disposed in a noncriminal manner. Where a guilty plea is entered as a prerequisite for admission to the pretrial diversion program, the appropriate circuit or district judge must review and grant his approval or disapproval. An express provision is included granting the district attorney absolute immunity, criminal or civil, for the conduct of any offender while participating in the pretrial diversion program

**Act # 2006-418**  
**SB 564 Sanders**

**4<sup>th</sup> Circuit DA Pre-Trial Diversion Program**  
**Effective April 14, 2006**

This bill is similar to the pretrial diversion bills passed for the 19<sup>th</sup> and 1<sup>st</sup> Judicial Circuits, except there is a provision providing that the circuit clerks of Dallas, Bibb, Perry, Wilcox and Hale Counties shall collect the fees assessed for the DA and are entitled to \$25 of the fee of each applicant. Twenty Five dollars of each fee also is earmarked for the county. This bill also requires that the opinion of the law enforcement officers involved in the offense be sought and used in the decision for admission to the program. The Fees assessed for the program are as follows:

Felony Offenses –	Up to \$750
Non Traffic Misdemeanor Offenses –	Up to \$500
Traffic offenses –	Up to \$300

**Act # 2006-89**  
**HB 192 Gipson**

**19<sup>th</sup> Circuit; Pretrial Diversion Program**  
**Effective February 22, 2006**

Authorizes the District Attorney of the 19<sup>th</sup> Judicial Circuit to establish a pretrial diversion program and assess unlimited fees for program participation. There is authority for waiver of the fees based on indigency, as determined by the District Attorney. Those eligible to apply for admission to the program are offenders charged with traffic offenses, property offenses, offenses not involving serious physical injury to the victim or victims under 14 years of age, misdemeanors and violations. Excluded are offenses of drug trafficking or distribution of drugs, child abuse, elderly abuse, sex offenses, Class A felonies, offenses involving serious injury or death. The Act includes a specific provision which makes all of the district attorney's pretrial diversion program records confidential. For those that successfully complete the program, charges against the offender are disposed in a noncriminal manner. Where a guilty plea is entered as a prerequisite for admission to the pretrial diversion program, the appropriate circuit or district judge must review and grant his approval or disapproval. An express provision is included granting the district attorney absolute immunity, criminal or civil, for the conduct of any offender while participating in the pretrial diversion program.

**Act 2006-222 & Act 2006-202**  
**HB 375 Hammett**  
**SB 77 Lindsey**

**21st Circuit; Pretrial Diversion Program**  
**Effective June 1, 2006**

Authorizes the district attorney of the 21<sup>st</sup> Judicial Circuit to establish a Pretrial Diversion program and assess a fee of not more than \$1,000 for participation. Although there are provisions stating that offenders charged with certain offenses are not generally eligible to participate in the program, i.e., traffic offenses, conservation offenses, offenses involving serious injury or death, etc. the district attorney can waive any of the prohibitions. There is no provision detailing the disposition of the case upon completion of the program and no provision regarding the expungement or confidentiality of records.

## **XII. CASES**

### **APPEALS**

#### **Rule 30.1 – Right to Appeal**

Rules of Criminal Procedure 14.4 and 26.9, amended August 1, 2002, limiting a defendant's right to appeal a guilty plea, apply to all guilty pleas regardless of the court, i.e., municipal, district and circuit. *Ex parte State v. Sorsby*, 2005 WL 3441246 (Ala.Crim.App. 2005).

### **CREDIT FOR TIME SERVED**

#### **Jail Credit Must Be Certified By Court Clerk**

Section 15-18-5, Alabama Code 1075, provides:

“Upon conviction and imprisonment for any felony or misdemeanor, the sentencing court shall order that the convicted person be credited with all of his actual time spent incarcerated pending trial for such offense. The actual time spent incarcerated pending trial shall be certified by the circuit clerk or district clerk on forms to be prescribed by the Board of Corrections.”

*Fuqua v. State*, 910 So.2d 141 (Ala.Crim App (2005); *Culbreth v. State* 2007 WL 624718 (Ala.Crim.App March 2, 2007); *Wilson v. State*, 2007 WL 1519005 (Ala.Crim.App. May 25, 2007); *See also*, Rule 26.9(b)(2) Ala. R.Crim.P. .

#### **Incarceration in Another State**

Holding that §15-18-5, Code of Alabama 1975, does not limit credit to time spent incarcerated within the State of Alabama, the Court of Criminal Appeals held that a defendant who, as a result of a fugitive warrant issued in Alabama, spends time incarcerated in another state, is also entitled to credit for the time he spent incarcerated out-of-state prior to his return to Alabama to face trial. *Culbreth v. State* 2007 WL 624718 (Ala.Crim.App March 2, 2007).

#### **Credit Not Applicable to Escape**

The court noted that the defendant would not be entitled to credit for the time incarcerated outside of Alabama if he had escaped from custody following his conviction. “See §15-18-5, Ala.Code 1975 (‘An escapee from a state penal institution who is recaptured and returned to custody shall be credited with all of his actual time spent incarcerated within the State of Alabama prior to his transfer and return to the custody of the [Department] of Corrections.’) *See also*, *Boutwell v. Nagle*, 861 F.2d 1530 (11<sup>th</sup> Cir. 1988).” *Culbreth v. State*, 2007 WL 624718 (Ala.Crim.App. 2007)

## **CREDIT FOR TIME SERVED**

### **Pre-Conviction Jail Credit Unaffected by Type Sentence**

Citing § 15-18-5, *Code of Alabama* 1975, and Rule 26.9(b)(2) of the Alabama Rules of Criminal Procedure, the Court of Criminal Appeals held that a defendant was entitled to credit towards his sentence for the time spent incarcerated prior to conviction, and this right was unaffected by the fact that he was sentenced under the split sentence statute which prohibits defendants from receiving deductions from their sentence under the Correctional Incentive Time statute or parole during the minimum period of confinement. *Fuqua v. State*, 910 So.2d 141 (Ala.Crim App (2005).

### **Jail Time Can Be Considered In Determining Sentence But Credit Still Due**

Rejecting the State's argument that the defendant was not entitled to a reduction of his sentence by jail credit, because the trial court already took his prior incarceration into consideration when imposing sentence, the Court of Criminal Appeals stated, "Although this Court is aware of no restriction on the trial court's 'taking into consideration' factors such as the actual time spent in jail pending trial in determining an appropriate sentence, the plain language of §15-18-5 does not permit the trial court to forgo ordering that the actual time spent in jail pending trial be credited against the sentence imposed." *Fuqua v. State*, 910 So.2d 141 (Ala.Crim App (2005).

### **Evidentiary Hearing Required On Challenge of Miscalculation of Jail Time**

In this case, a prisoner filed a habeas corpus petition alleging that he had not been credited with sufficient jail time. The State offered no facts to contradict the petitioner's claims, ADOC failed to refute the allegations that the petitioner was entitled to additional credit for jail time, but did attach an affidavit from Kathy Holt, the Director of Central Records, stating that DOC had awarded jail credit as certified by the circuit clerk. Holding that State's response failed to address the substance of the petitioner's claims, i.e. that the court clerk either miscalculated or misreported the correct amount of pretrial jail time on the forms submitted to the Department of Corrections, the Court of Criminal Appeals remanded the case with instructions to hold an evidentiary hearing to determine if whether jail time was properly calculated and reported. *Wilson v. State*, 2007 WL 1519005 (Ala.Crim.App. May 25, 2007); *See also, Quick v. State*, 2007 WL 1227793 (Ala.Crim.App. 4/27/07).

### **Jail Credit – Out-of State Incarceration Pursuant to Extradition Warrant**

The appellant's claim that he was not given sufficient credit for the time he spent in jail awaiting trial, specifically the time he was incarcerated in Connecticut on an Alabama extradition warrant to answer for the charged crime. Noting that DOC did not refute the appellant's specific allegation, but rather by affidavit from Kathy Holt, Correctional

Records Director for DOC, only stated DOC had given jail credit as certified by the circuit clerk, the Court of Criminal Appeals remanded the case to the trial court to conduct an evidentiary hearing.

## **CREDIT FOR TIME SERVED**

*Gunn v. State*, 2007 WL 18654775 (Ala.Crim.App. 6/29/07).

### **Credit for Time Served Mandatory – Probation Revocation §15-22-54(d)(3)**

Section 15-22-54(d)(3) provides that if revocation of probation results in a sentence of confinement, credit must be given for all time the offender spent in custody prior to revocation. In the instant case, the petitioner argued that he was never given credit for the 18 months he served in jail on a split sentence before he was released on probation, which was subsequently revoked. Because the State and trial court failed to specifically respond to these allegations and it was unclear from the conviction report the type of sentence imposed, the Court of Criminal Appeals remanded the case for further proceedings.

*Stults v. State*, 2007 WL 1865424 (Ala.Crim.App. 6/29/07);

## **CRIMES**

### **Attempted First Degree Robbery Does Not Exist as Separate Offense from Robbery 1<sup>st</sup>**

Reversing and remanding the trial court's denial of defendant's request to withdraw his guilty plea to "attempted first degree robbery," the Court of Criminal Appeals held that because there was no longer an offense of "attempted robbery," since action subsumed within the provisions of the offense of robbery in the first degree, defendant's conviction was void. Citing *Watkins v. State*, 941 So.2d 343 (Ala.Crim.App. 2006) and *Pilgrim v. State*, 2006 WL 3734753 (Ala.Crim. App. 12/20/06), the Court noted that since this was a void judgment, the State could re-indict the defendant for the appropriate offense of first degree robbery pursuant to §13A-8-40(b).

*Crane v. State*, 2007 WL 1227751 (Ala.Crim.App. 4/27/07).

### **Escape From Community Corrections Program – Can Be Charged As Escape 1<sup>st</sup> Depending Upon Facts**

An inmate who escapes from a community corrections program can, under the appropriate circumstances, properly be charged with and convicted of first degree escape, i.e. if he uses physical force, threat of physical force, or a deadly weapon or instrument in escaping, or if he escapes after having been convicted of a felony.

Holding that the trial court erred in dismissing the indictment based on the belief that an inmate taking part in a community corrections program could not be charged with and convicted of first degree escape, the Court of Criminal Appeals noted that the language in the SIR statute and the Community Punishment and Corrections Act pertaining to escape were almost identical. In *Ex parte Jones*, 530 So.2d 877 (Ala. 1988), the Alabama Supreme Court held that an inmate who escapes from the SIR program could be charged with escape in the first, second or third degree, depending upon the facts of the case.

## CRIMES

While the Court of Criminal Appeals held that first degree escape could apply to a community corrections inmate who refused to remain within the extended limits of his confinement, it declined to express an opinion as to the efficacy of the first degree escape charge against this defendant, leaving that determination to the jury or other finder of fact.

*State v. Wright*, 2007 WL 1866745 (Ala.Crim.App. 6/29/07).

### Unlawful Manufacture of Controlled Substance - §13A-12-217 & 218 One or more Precursors

The offense of unlawful manufacture of a controlled substance, §13A-12-217 does not require that there be evidence of more than one precursor substance. *State v. Woodall*, 2007 WL 524606 (Ala.Crim.App. 2007); *O'Callaghan v. State*, 945 So.2d 467 (Ala.Crim.App. 2006); *State v. Wilson*, 2006 WL 2457474 (Ala.Crim.App. 2006); *Brand v. State* 941 So. 2d 318 (Ala.Crim.App. 2006).

### Concurrent Sentences Only Authorized for Convictions of Burglary and Theft Arising out of Same Transaction

Although a defendant can be convicted of both burglary and theft where the crimes arose from the same transaction, the defendant may only receive one punishment.

*Ex parte McKelvey*, 630 So.2d 56 (Ala. 1992). *See also, Brown v. State*, 821 So.2d 219,225 (Ala.Crim.App. 2000), in which the Court of Criminal Appeals held that a defendant convicted for burglary and theft arising from the same transaction could be sentenced for both if the sentences are made concurrent, rather than consecutive.

The McKelvey opinion has been restricted as applying only to “kindred crimes,” which trial courts must determine from analyzing the statutes involved. *Ex parte Dixon*, 804 So.2d 1075, 1080 (Ala. 2000). The Court of Criminal Appeals has held that *McKelvey* is inapplicable to cases involving robbery and burglary, rape and burglary, or sodomy and burglary.

*Dawson v. State*, 675 So.2d 897, 902(Ala.Crim.App. 1995).

### BUI -Traffic Offense Which Must be Charged by UTTC

Boating under the influence of alcohol is a misdemeanor traffic offense and in order for the court to acquire subject matter jurisdiction, the State must commence the prosecution by filing a valid UTTC.

*Stoll v. State*, 724 So.2d 90 (Ala.Crim.App. 1998; *See also*, AG Opinion 2005-113, 2005 WL 1121890 (April 18, 2005).

## **CRIMES**

### **Omission of Essential Element of Intent in RSP 1<sup>st</sup> Degree Not Jurisdictional**

Reversing a line of cases from the Court of Criminal Appeals, the Alabama Supreme Court held that omission from an indictment of the essential element of intent was not a jurisdictional defect that could be raised for the first time in a Rule 32 petition. The Court opined that such claims are subject to the same preclusion bars applicable to post-conviction petitions based on other non-jurisdictional errors. *Ex parte Madden*, 2007 WL 1519866; *Ex parte Seymour*, 946 So.2d 536 (Ala. 2006).

## **CRUEL AND UNUSUAL PUNISHMENT**

### **Trafficking Sentence for First Offender held to be Unconstitutional as Cruel and Unusual Punishment**

Trafficking in morphine, 13A-12-231(3)(d), mandating imposition of a life without parole sentence for a first-time drug offender is unconstitutional under the 8<sup>th</sup> Amendment prohibition against cruel and unusual punishment.  
*Wilson v. State*, 830 So.2d 765 (Ala.Crim.App. 2001)

### **Execution of Mentally Retarded**

The Eighth Amendment prohibits execution of mentally retarded person.  
*Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L. Ed. 2d 335 (2002)

### **Execution of Child**

“The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”  
*Roper v. Simmons*, 125 S.Ct. 1183 (2005).

### **Hitching Post Case – No Immunity for Alabama Prison Guards**

An Alabama prison inmate that was handcuffed to a hitching post by Alabama prison officials for disruptive conduct filed this § 1983 lawsuit against three guards alleging that his 8<sup>th</sup> Amendment rights were violated. Without deciding whether this action was an 8<sup>th</sup> amendment violation, the Magistrate Judge found that the guards were entitled to qualified immunity. The District Court for the Northern District of Alabama, entered summary judgment for the respondents and the Court of Appeals for the 11<sup>th</sup> Circuit affirmed.

The United States Supreme Court reversed, holding that the inmate was subjected to cruel and unusual punishment in violation of the 8<sup>th</sup> Amendment and the prison guards were not entitled to the defense of qualified immunity in light of a prior warning by the



## **CRUEL AND UNUSUAL PUNISHMENT**

Department of Justice of the constitutional infirmity of the use of a hitching post by Alabama's Department of Corrections, DOC's regulation governing use of the hitching post and binding 11<sup>th</sup> Circuit precedent.

*Hope v. Pelzer, et al.*, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (S.Ct. 2002)

## **DOUBLE JEOPARDY**

### **Double Jeopardy – Possession of Separate Drugs Arising Out of Single Act of Possession; Splitting Cause of Action**

The Court of Criminal Appeals held that the defendant's double jeopardy rights were violated when he was convicted for multiple offenses of possession of a controlled substance, methamphetamine and Xanax, where these offenses arose out of a single act of possession. The Court noted that the statutory requirements constituting possession of a controlled substance contain the same elements for possession of either drug and that possession of both drugs represented one act of possession.

*Hollaway v. State*, 2007 WL 1519012 (Ala.Crim.App. 5/25/07).

### **Double Jeopardy – Identity Theft Based on Alternative Methods of Proving Single Theft**

Remanding the case to the trial court for entry of a new judgment, the Court of Criminal appeals held that the defendant's convictions and sentences for two counts of identity theft for a single theft violated double jeopardy principles.

"[T]he offense of identity theft may be committed by several different methods, and the State may allege and prove any one or all of those methods in its attempt to establish the defendant's guilt. We have found no indication that the legislature intended to impose multiple punishments under the separate subsections of §13A-8-192(a) when the actions described in each of those subsections are based on the same conduct of the accused against the same victim." Citing *Ex parte Rice*, 766 So. 2d 143 (Ala. 1999), the Court noted that merely ordering the defendant's sentences to run concurrently was not a constitutionally acceptable option to cure this constitutional violation.

*Egbuonu v. State*, 2007 WL 1519001 (Ala.Crim. App. 5/25/07).

### **Double Jeopardy - Finding of Guilty When Crime *Thought* to be Lesser Included Offense**

"[A] defendant that proceeds to the conclusion of a criminal trial in which the jury, under instructions expressly finds the defendant not guilty of the offense charged in the indictment, but finds him guilty of an offense not contemplated by the indictment, resulting in a void conviction, may not be retried for the charged offense of which he has been acquitted." In this case the defendant's conviction for second degree assault under an indictment charging Robbery 1<sup>st</sup> was reversed, with the Court holding that his conviction of second degree violated the double jeopardy clause.

## **DOUBLE JEOPARDY**

*Ex parte State of Alabama (In re: Robert Bradley)*, 925 So.2d 232 (Ala. 2005)

### **One Conviction – Alternative Means of Proving Crime**

A defendant cannot be convicted of both a capital offense and a lesser offense included in the capital charge. *Carruth v. State*, 927 So.2d 866 (Ala.Crim.App. 2005).

Conviction of eight counts of capital murder arising out of killing three people violated constitutional prohibition against double jeopardy.

*Castillo v. State*, 925 So.2d 284 (Ala.Crim.App.2005)

Conviction for both capital murder and intentional murder based on killing one victim was in violation of double jeopardy prohibition.

*Cooper v. State*, 912 So.2d 1150 (Ala.Crim.App. 2005).

Two murder convictions arising out of a single incident and involving a single victim violated prohibition against double jeopardy and could not be remedied by lording concurrent sentences.

*Banks v. State*, 919 So.2d 1225 (Ala.Crim.App. 2005); *Loggins v. State*, 910 So.2d 146 (Ala.Crim.App. 2005).

Double Jeopardy prohibits multiple convictions and multiple sentences for felony-murder if the convictions arise from a single killing.

*Hardy v. State*, 920 So.2d 1117 (Ala.Crim.App. 2005).

## **DRUG COURTS**

### **Authority**

While the Court's decision in *Ex parte Webber* never reached the merits of the case, there was a good discussion of the court's authority to dismiss a case over the prosecutor's objections when a defendant participates in a drug court program operated as a part of the local DA's pretrial diversion program or pursuant to the Mandatory Treatment Act (§ 12-23-5, Code of Alabama 1975). In her dissenting opinion, Justice Stuart noted that Rule 13.5 (c)(1) of the Rules of Criminal Procedures providing for dismissal of indictments does not provide a basis for dismissal of a case due to successful completion of drug court, and that the decision to permit a defendant to complete a treatment program in lieu of prosecution pursuant to provisions of the Mandatory Treatment Act or local pre-trial diversion act for Montgomery County is "solely within the prosecutor's discretion."

*Ex parte Webber*, 892 So.2d 869 (Ala. 2004)

### **Not Appealable**

The prosecutor's decision to refer a defendant to drug court as an alternative to prosecution pursuant to § 12-23-5, Ala.Code 1975, is solely within the prosecutor's discretion and is not subject to appellate review.

*C.D.C. v. State*, 821 So.2d 1021 (Ala.Crim.App. 2001)

## DUI/TRAFFIC

### **Jurisdiction**

#### Felony DUI and Misdemeanor DUI Charged in Indictment – Dismissal of Indictment Required

Withdrawing its original opinion issued June 29, 2001, the Court of Criminal Appeals held that the circuit court lacked jurisdiction to accept the defendant's guilty plea to felony DUI. The Court remanded the case to the circuit court with instructions for it to dismiss the indictment as fatally defective and notify the Decatur Municipal Court that it should reassume jurisdiction of the conviction, because reversal did not preclude the revival of the original traffic case based on the ticket for DUI.

Trying to reconcile the Court's holding a month earlier in *Davis v. State*, 806 So.2d 404 (Ala.Crim.App. 2001), in a specially concurring opinion Judge Shaw stated that the distinguishing facts in the instant case were, unlike in the *Davis*, the indictment on its face did not charge a felony DUI offense, only a misdemeanor DUI. He noted that the question certified to the Court in *Davis* "was based on the underlying premise that the defendant had been charged, in a valid indictment, with felony DUI and that the indictment had invoked the jurisdiction of the circuit court.

*Dutton v. State*, 807 So.2d 596 (Ala.Crim.App. 2001).

#### Indictment Charged Misdemeanor DUI – Circuit Court Lacked Jurisdiction

This case involved a defendant charged with DUI at the time there was a 5 year limitation on the use of prior DUI convictions to enhance to a felony offense. Although the defendant had 4 prior DUI convictions, by the time he was indicted, only 2 priors were within the preceding 5-year period. The Court of Criminal Appeals held that since the indictment only charged a misdemeanor DUI, the Circuit Court had no jurisdiction and the municipal Court of Decatur had exclusive original jurisdiction.

Noting that jeopardy had not attached because the circuit court never acquired jurisdiction, the Court remanded the case to the circuit court with instructions to dismiss the indictment as fatally defective and to notify the Decatur Municipal Court that it should resume jurisdiction, i.e. revive the original traffic case based on the DUI ticket. The Court noted that there was no statute of limitations issue because the UTC tolls the limitations period for purposes of commencement of the prosecution of misdemeanors, citing *Hastings v. State*, 589 So.2d 795(Ala.Crim.App. 1991).

District Court has exclusive jurisdiction over misdemeanor DUI (traffic) even when an indictment has been returned.

*Wright v. State*, 494 So.2d 117, 179 (Ala.Crim.App. 1986).

## DUI/TRAFFIC

### Felony DUI Sentence Enhancement Not In Indictment

Failure to reference felony sentencing provision in indictment for driving under the influence did not deprive the trial court of jurisdiction to impose a felony sentence. A violation of subsection (h) of §31-5A-191 (felony DUI provision) does not have to be alleged in the indictment. It is a sentence enhancement.

*Pruitt v. State*, 897 So.2d 406 (Ala.2004).

### Listing Prior DUI Convictions on Indictment Held Harmless Error

Defendant failed to preserve for appellate review his claim that alleged defect in his indictment for felony offense of driving under the influence (DUI) was fatally flawed because it listed prior DUI convictions rather than simply charging him with felony DUI

*Owens v. State*, 825 So.2d 861 (Ala.Crim.App. 2001).

Dismissal of a felony DUI charge against a defendant does not strip the circuit court of jurisdiction over the remaining misdemeanor charges.

*Casey v. State*, 740 So.2d 1136 (Ala.Crim.App. 1998).

Prosecutions for felony “DUI offenses are to be initiated in the circuit court by the return of an indictment.

*Ex parte Formby*, 750 So.2d 587, 590 (Ala. 1999).

### Misdemeanor Alleged in Indictment

Indictment charging only misdemeanor DUI was struck down in *Hamilton v. State*, 828 So. 2d 957 (Ala.Crim. 2002), with the Court of Criminal Appeals holding that the circuit court lacked jurisdiction over the defendant and that the defendant could not consent to amendment to charge felony DUI.

*Hamilton v. State*, 828 So. 2d 957 (Ala.Crim. 2002); *Blevins v. State*, 747 So.2d 914 (Ala.Crim.App. 1998).

The indictment must charge felony DUI to put the defendant on notice. “{T}he absence of a reference to § 32-5A-191(h) in an indictment otherwise charging an offense defined in § 32-5A-191(a), Ala.Code 1975, is not a jurisdictional defect, it is a notice defect. *Pruitt v. State*, 897 So.2d at 408. Lack of notice from the State regarding its intentions to seek application of sentence enhancements is not a jurisdictional defect prohibiting action on the indictment, but rather a constitutional concern the denial of which may not be challenged in the absence of an objection made at trial.

*Altherr v. State*, 911 So.2d 1105 (Ala.Crim.App. 2004).

## DUI/TRAFFIC

### Subsection (b) Youth Adjudications Used for Enhancement

Prior convictions under DUI statute applicable to drivers under 21 can be used to enhance sentence.

*Casaday v. State*, 828 So.2d 960 (Ala.Crim.App. 2002).

### Felony DUI – Use Other State Convictions For Enhancement

Prior to passage of Act 2006-654, effective April 28, 2006, convictions of DUI from other states could not be used to enhance a defendant's sentence to a felony under Alabama's DUI statute. *Ex parte Bertram*, 804 So.2d 889 (Ala.2003); *Browning v. State*, 901 So.2d 757 (Ala.Crim.App. 2004). The DUI statute was amended by Act 2006-654 to specifically provide that out-of state convictions could be used for enhancement; however language was added referencing conviction occurring within a five-year period: "A prior conviction within a five-year period for driving under the influence of alcohol or drugs from this state, a municipality within this state, or another state or territory or a municipality of another state or territory shall be considered by a court for imposing a sentence pursuant to this section." The extent that this provision limits the use of priors, if at all, must be determined by the courts or clarified by the legislature.

### Enhancement for Priors - Within 5 Years Limitation

The date of conviction, rather than the date of the offense or arrest, controls for enhancement purposes.

*State v. Brooks*, 701 So.2d 56, 57 (Ala.Crim.App. 1996); *Dutton v. State*, 807 So.2d 596 (Ala.Crim.App. 2001).

### Uncounseled Prior DUI Can Be Used for Enhancement if No Jail Time

To use a prior DUI conviction to enhance a defendant's DUI sentence, the state does not have to prove that that defendant was represented by counsel or knowingly and voluntarily waived counsel, if the defendant did not receive jail time in the prior proceeding.

*State v. Thrasher*, 783 So.2d 103 (Ala. 2000); *Bolan v. State*, 872 So.2d 879 (Ala.Crim.App. 2003).

### Proof of Prior Convictions – Remand for New Sentence Hearing

The State may prove prior convictions at a second sentencing hearing following remand by an appellate Court.

*Altherr v. State*, 911 So.2d 1105 (Ala.Crim.App. 2004).

## DUI/TRAFFIC

### Evidence of Prior DUI Not Admissible

Erroneous admission of defendant's prior DUI conviction for purpose of rebuttal required reversal of defendant's felony DUI conviction.

*Upton v. State*, 933 So.2d 1105 (Ala.Crim.App. 2005)

### Driver's License Suspension – Removal Upon Dismissal of Charges

Amendment of § 32-5A-304 (c) providing for removal of notation of driving record where charge is dismissed, nolle prossed or the person is acquitted, applies retroactively.

*Alabama Department of Public Safety and Andrews v. Clark*, 865 So. 2d 1199 (Ala.Civ. App. 2003)

### DUI – Municipal Ordinance Violations; Penalties May Differ from State Statute; Legislature Approved Greater Fine For Municipal DUI First Offender Convictions

Upholding a Decatur city ordinance prohibiting DUI and establishing penalties, the Court of Criminal Appeals held that the ordinance was valid although the penalty provisions referenced "violations of §32-5A-191." Noting that §11-45-9(b) governing the penalties for municipal ordinance offenses, does provide for a greater fine for DUI offenders (regardless of priors), than its state DUI counterpart (§32-5A-191), the Court of Criminal Appeals noted that these two statutes address different subjects and held that there was no conflict between the statutes. The Court held that a municipal ordinance can impose a heavier penalty for an offense than the state statute imposes for the same act in violation of the statute. See *Donley v. City of Mountain Brook*, 429 So.2d 603 (Ala.Crim.App. 1982) holding that the punishment for a violation of a municipal ordinance and a state statute that proscribes the same act does not have to be the same.

*City of Decatur v. Lindsey*, 2007 WL 1865532 (Ala.Crim.App. 6/29/07)

Only those state inmates that are transferred from state custody to county custody with the approval of DOC can be charged with the misdemeanor offense escape (§14-8-42) if they escape from work release while in county custody. Inmates in county custody awaiting transfer to DOC who escape or fail to return from work release will be subject to felony escape penalties pursuant to 13A-10-33.

*Conner v. State*, 840 So.2d 950 (Ala. 2002)

## **GUILTY PLEA**

### **Guilty Plea – Colloquy or Documentation By Judge of Voluntariness of Plea Required – Misdemeanor and Felony Offenses; Rule 14.4 ARCrP**

In this case the defendant attempted to withdraw his guilty plea to two misdemeanor offenses and the trial court denied the motion. The Alabama Supreme Court affirmed the Court of Criminal Appeal's reversal of the trial court, holding that because record did not reflect that the trial court addressed the defendant and determined the pleas were voluntary as required by *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), *Twyman v. State*, 300 So.2d 124 (Ala. 1974), or Rule 14.4 of the Alabama Rules of Criminal Procedure, the record was not sufficient to permit appellate review. The Supreme Court noted that the Explanation of Rights and Plea of Guilty forms were not signed by the trial court, and neither the sentencing order nor the entries on the case action summary indicated that the trial court addressed the defendant and determined the pleas were voluntary. *Ex parte Fleming*, 2007 WL 1519868 (Ala. 5/25/07).

### **Guilty Plea – Advising Defendant of Right to Appeal Not Jurisdictional**

Failure of the trial court to advise a defendant of his right to appeal his guilty plea conviction is not a defect that impacts the jurisdiction of the trial court. *Robey v. State*, 950 So.2d 1235 (Ala.Crim. App. 8/25/06), overruling *Lancaster v. State*, 638 So.2d 137 (Ala.Crim.App. 1993). See Justice Stuart's dissent from denial of Writ of Cert., *Ex parte Robey*, 2006 WL 2522628 (Ala. 9/1/06).

### **Guilty Plea – Limited Right to Appeal**

After August 1, 2002, the effective date of amendments to Criminal Rules 2.2, 14.4 and 26.9, a defendant has only a limited right to appeal a guilty plea and that right is only preserved by (1) specifically reserving an issue before the entry of the guilty plea or (2) by filing a written motion to withdraw the plea. *Williams v. State*, 854 So.2d 625 (Ala.Crim.App. 2003); *Ingram v. state*, 882 So.2d 374 (Ala.Crim.App. 2003). The Rules of Criminal limited right to appeal a guilty plea apply to all guilty pleas, no matter what court is accepting the plea; thus it applies to appeals *de novo* to circuit court. *Ex parte Sorsby*, 2005 WL 3441246 (Ala.Crim.App. 2005).

### **Guilty Plea - Withdrawal**

Pursuant to a plea agreement that the defendant would be sentenced to 15 years imprisonment and that he could apply for probation, which the State would recommend, the defendant entered a guilty plea to first-degree rape. Through a guilty plea colloquy, the court questioned the defendant at length regarding his understanding of the plea agreement to ensure that he understood the State was promising to make a recommendation of probation, but that there was no guarantee the court would follow this recommendation and grant his request. The trial court sentenced the defendant to 15 years, as set out in the plea agreement, but postponed a decision on his probation request. Prior to the probation hearing, the defendant filed a motion to withdraw his guilty plea,

## **GUILTY PLEA**

which the trial court denied. Relying on *Brown v. State*, 495 So.2d 729 (Ala.Crim.App. 1986), the Court of Criminal Appeals reversed the trial court's denial of the defendant request to withdraw his guilty plea, holding that this was a bargained for sentencing recommendation which the court did not follow, denial of which resulted in reversal. *Nelson v. State*, 866 So.2d 594 (Ala.Crim.App. 2002), certiorari denied, 866 So.2d 599 (Ala. 2003).

### **Illegal Alien - No Notice of Possible Deportation Required**

Rejecting the defendant's argument that his attorney was ineffective because he was not informed of the possibility of deportation, the Court of Criminal Appeals held that because deportation was not a direct consequence of the plea, the petitioner was not required to be advised of the possibility that the United States Immigration and Naturalization Service (a department over which the judge has no authority) may deport as a result of his guilty plea.

*Rumpel v. State*, 847 So.2d 399 (Ala.Crim.App. 2002).

### **Factual Basis – “Best Interest” Plea**

“The only factual basis required for a guilty plea is that which will satisfy the court that the appellant knows what he is pleading guilty to. ... The factual basis [can be] established, in part, by the appellant's admission that he knew to what offense he was pleading guilty.... Likewise, the reading of the indictment [is] sufficient to establish a factual basis for a guilty plea in certain cases, (and) in those cases it is not required that the indictment be read into the record during the guilty plea hearing.”

*Scott v. State*, 917 So.2d 159 (Ala.Crim.App. 2005).

### **Fines and Assessments**

Imposition of \$25,000 fine in connection with statutory drug trafficking firearm possession enhancement [§13A-12-231 (13)] is mandatory. A defendant must be informed of the maximum and minimum possible sentences as an absolute constitutional prerequisite to the acceptance of a guilty plea. Failure to inform a defendant of a mandatory fine prior to entry of a guilty plea is reversible error. This also applies to fines pursuant to the Drug Trafficking Firearm Enhancement statute and mandatory Drug Demand Reduction Assessments.

*Carter v. State*, 812 So.2d 391 (Ala.Crim.App. 2001; *Calloway v. State*, 860 So.2d 900 (Ala.Crim.2002)

### **Guilty Pleas – Colloquy Required Except for Minor Misdemeanors**

Pursuant to Rule 14.4 of the Alabama Rules of Criminal Procedure, a colloquy is required prior to accepting a guilty plea to any offense other than a minor misdemeanor and the record itself must reflect that the trial judge personally addressed the defendant regarding his or her rights and issues included in the guilty plea form.

*Fleming v. State*, 2006 WL 2788987 (Ala.Crim.App. (9/29/06).



## JURISDICTION

### Failure to Afford Defendant an Allocution is not Jurisdictional

Failure to afford a defendant an allocution is a procedural requirement at the pronouncement of sentence, not jurisdictional, and is subject to the procedural bars set out in Rule 32.2 of the Alabama Rules of Criminal Procedure. Failing to provide an allocution does not divest the trial court of jurisdiction to impose sentence.

*Shaw v. State*, 949 So.2d 184 (Ala.Crim.App. 2006); *Holloway v. State*, 2006 WL 2788988 (Ala.Crim.App. 9/29/06).

### Trial Court's Jurisdiction To Amend Sentence – 30 Day Rule

In the absence of a motion for a new trial or a request to modify a sentence, filed within 30 days after sentencing, the trial court loses jurisdiction to modify a defendant's sentence at the end of the 30<sup>th</sup> day.

*Ex parte Hitt*, 778 So.2d 159 (Ala. 2000); *Moore v. State*, 814 So.2d 308 (Ala.Crim.App. 2001).

In *Moore*, the Court of Criminal Appeals noted the Criminal Rules appear to extend the time for reconsideration to change sentences from consecutive to concurrent. “Rule 26.12(c) Ala.R.Crim.P., appears to give a trial court some leeway to amend a sentence order after the 30-day jurisdictional period had expired. ‘*Reconsideration. The court may at any time by a nunc pro tunc order provide that previously imposed consecutive sentences run concurrently.*’ The committee comments to Rule 26 state: ‘*Section (c) allows the judge discretion to, at any time, amend a sentence order to permit a sentence to run concurrently with another sentence.*’ However, Rule 26.12 does not authorize the trial court to amend a sentence order to change a concurrent sentence to a consecutive sentence.’” *Moore* 814 So.2d, 308, 309

### Consecutive vs. Concurrent

Unless a defendant is advised that consecutive sentences might be ordered, his guilty plea is not voluntarily and knowingly entered.

*Taylor v. State*, 846 So.2d 1111 (Ala.Crim.App. 2002).

While Rule 26.12 Ala.R.Crim.P., grants a trial judge discretion to amend a sentence order to permit a sentence to run concurrent with another sentence, it does not authorize the trial court to amend a sentence order to change a concurrent sentence to a consecutive sentence.

*Smitherman v. State*, 2006 WL 2788978 (Ala.Crim.App. 2006); *Moore v. State*, 814 So.2d 308 (Ala.Crim.App. 2001); *Phillips v. State*, 932 So.2d 165 (Ala.Crim.App. 2005)

## JURISDICTION

### Court Has No Jurisdiction to Consider Successive Kirby Motions

“[O]nce a circuit court has considered one motion for reconsideration of sentence filed by a defendant in a particular case, the defendant’s rights with regard to that case will have been sufficiently safeguarded. Thereafter, the circuit court will not have jurisdiction to consider any second or successive motions for reconsideration filed by that defendant in that particular case. Instead, it should summarily deny any such motion.”

*Wells v. State*, 941 So.2d 1008 (Ala.Crim.App. 2005), rehearing denied 12/16/05, cert denied 5/12/06.

### Restitution and Fines Can Only Be Modified Within 30 Days of Final Order

The Court of Criminal Appeals held that the trial court lacked jurisdiction to modify its original order and increase the restitution and crime victim’s compensation owed by a defendant in exchange for probation since the final order issued was over 30 days. The Court opined, “Restitution and a statutory assessment, like a fine, are components of a sentence. Therefore, we hold that a final restitution order, like a sentencing order, can only be modified within 30 days of the order’s becoming final; the same is true of the amount of a statutory assessment.”

*Dixon v. State*, 920 So.2d 1122 (Ala.Crim.App. 2005), rehearing denied 6/24/05, cert. denied 8/12/05

### Contempt Not Applicable to Require Restitution of Indigents

Holding that the trial court did not have jurisdiction to issue a contempt order against an indigent defendant for failure to meet the court ordered restitution order, the Court of Criminal Appeals stated:

“Nowhere in our case law, statutes or rules will a case of constructive contempt lie for the inability to pay a debt owed to a creditor or, in this case a victim. Rather a suit is commenced, a judgment is obtained and executed, and a lien is imposed or wages are garnished. That is, the victim takes advantage of his or her civil remedies; the court does not act as an enforcer and compel payment to the victim through the imposition of a criminal penalty upon the indigent debtor.”

...

“In order to hold a person in contempt, a court must have jurisdiction over the person and the subject matter...Our law does not contemplate that this type of contempt action will lie in order to circumvent the clear prohibition in Rule 26.11(I)(2) against jailing an indigent defendant for his or her inability to pay court-ordered moneys.”

*Dixon v. State*, 920 So.2d 1122 (Ala.Crim.App. 2005), rehearing denied 6/24/05, cert. denied 8/12/05.

## JURISDICTION

### Omission of Essential Elements From Indictment Not Jurisdiction Defect

A defect in an indictment is not a jurisdictional error and a claim based on a defective indictment is subject to the same preclusive bars as any other nonjurisdictional error.

*Ex parte Madden*, 2007 WL 1519866 (Ala. May 25, 2007); *Ex parte Seymour*, 946 So. 2d 536 (Ala. 2006).

**Note – Overrules a line of cases: The holdings that defects in indictment deprive the trial court of jurisdiction in *Ex parte Lewis*, 811 So.2d 485 (Ala. 2001); *Cogman v. State*, 870 So.2d 762 (Ala.Crim.App. 2003), *Ash v. State*, 843 So.2d 213, and *Sullens v. State*, 878 So.2d 1216 (Ala.Crim.App. 2003) have been expressly overruled. Under the Supreme Court’s holding in *Ex parte Seymour*, a defect in a criminal indictment no longer deprives the trial court of jurisdiction, as it had under the common law, but instead was held to be a nonjurisdictional error that could be waived.**

### Mandamus Does Not Affect Without Stay of Judgment

Challenging the trial court’s authority to dismiss a case after the defendant had successfully completed a drug court program; the State filed a writ of mandamus. Noting that the State did not obtain a stay of final judgment the Alabama Supreme Court dismissed the petition as moot. The Supreme Court held that the trial court lost subject matter jurisdiction after expiration of the 30 day period following the judgment of dismissal. *Citing Ex parte St John*, 805 So.2d 684 (Ala. 2001), the Court opined that “the filing of a petition for a writ of mandamus against a trial judge does not divest the trial court of jurisdiction, stay the case, or toll the running of any period for obeying an order or perfecting a filing in the case.”

*Ex parte Webber*, 892 So.2d 869 (Ala. 2004)

## JURY INVOLVEMENT IN SENTENCING

### Jury Determination for Enhancement – The Beginning

In *Apprendi*, a defendant had pled guilty to unlawful possession of a firearm, which carried a maximum statutory sentence of ten years in prison. In the sentencing proceeding, the judge conducted an evidentiary hearing and found that Apprendi had committed the crime with the purpose of intimidating others based on race, etc. Pursuant to a separate hate crime statute, that finding enhanced Appendix’s statutory maximum sentence to 20 years. The Supreme Court held the state procedure unconstitutional, ruling that “[o]ther than the fact of a prior conviction, any fact that *increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.*” 530 U.S. at 490 (emphasis added).

## **JURY INVOLVEMENT IN SENTENCING**

The Court also held that a state hate crime statute which authorized increase in maximum prison sentence based on judge's finding by preponderance of evidence that defendant acted with purpose to intimidate victim based on particular characteristics of victim violated due process clause.

*Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435(2000).

### **Washington's Presumptive Sentencing Guideline System Held Unconstitutional**

Following the *Apprendi* decision, the United States Supreme Court subsequently held that Washington's sentencing guideline scheme violated the Sixth amendment by giving judges, rather than juries the authority to make factual determinations necessary to enhance sentences. This case struck down the "exceptional sentence" provisions in Washington's presumptive guideline system. Under this system a judge could depart from the guidelines if he found by a preponderance-of-the-evidence that an aggravating factor existed. The Court held that when a sentencing system imposes an upper sentencing threshold, effectively creating a maximum sentence, any fact that would increase a sentence beyond this maximum, like the elements of the offense, must be submitted to the jury and proven beyond a reasonable doubt.

*Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

### **Mandatory Federal Guidelines Now Voluntary**

Applying *Blakely* to the federal sentencing guidelines, the United States Supreme Court held that the mandatory portions of that sentencing system were unconstitutional. The Court reaffirmed its holding in *Apprendi* that "[A]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved by a jury beyond a reasonable doubt."

*United States v. Booker*, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)

### **Prior Conviction Exception**

The *Apprendi/Blakely/Booker* cases do not require prior convictions used for enhancement to be alleged in the indictment and proved by a jury beyond a reasonable doubt.

*Almendarez-Torres*, 118 S.Ct. 1219 (1998); *U.S. v. Moore*, 2007 WL 1875054 CA 11 (Fla) 2007.

### **Pleading Must Contain Aggravating Factors Used to Enhance – But Failure to Include in Indictment Not Plain Error**

The defendants were convicted of conspiracy to commit various drug offenses. They appealed and the 4<sup>th</sup> Circuit Court of Appeals affirmed the convictions, but vacated the sentences and remanded. On certiorari, the U.S. Supreme Court held that although the failure of the indictment to include any allegation regarding the quantity of drugs

## **JURY INVOLVEMENT IN SENTENCING**

involved in the alleged conspiracy violated the Apprendi rule and thus rendered the defendants' enhanced sentences erroneous, the error did not rise to the level of plain error. Reversed and remanded. *United States v. Cotton*, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed. 2d 860 (S.Ct. 2002)

### **Apprendi Not Extended to Mandatory Minimum Sentences**

The Supreme Court declined to extend the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to mandatory minimum sentencing schemes, holding that increases in the minimum sentence for an offense without increasing the maximum sentence may be treated as a sentencing factor rather than as an element of the offense. In *Harris* the defendant pleads guilty to distributing marijuana and was convicted after a bench trial of carrying a firearm in relation to a drug trafficking offense. At the sentencing hearing, the judge found that the defendant had "brandished" the weapon and consequently sentenced the defendant to the mandatory minimum sentence. The 4<sup>th</sup> Circuit Court of Appeals affirmed, and the United States Supreme Court agreed, holding that "brandishing" a firearm is a sentencing factor rather than an element of the crime, thus the judge was permitted to make the factual determination without jury involvement.

The Court noted that the statute criminalizing carrying of a firearm in relation to a drug trafficking offense set forth a single offense, in which "brandishing" and "discharging" are mere sentencing factors to be found by the judge, rather than elements of the offense to be found by a jury.

This decision has been cited by opponents of mandatory minimum sentencing statutes as underscoring the need to end mandatory minimum sentences. Emphasizing that part of Justice Breyer's concurring opinion commenting on mandatory minimums, the Families Against Mandatory Minimums quoted the following statement in their press release:

"Mandatory minimum statutes are fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system through the use of the Sentencing Guidelines. They transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have reintroduced much of the sentencing disparity that Congress created the Guidelines to eliminate. Applying Apprendi in this case would not, however, lead Congress to abolish or to modify such statutes, and it would take from the judge the power to make a factual determination while giving that power not to juries, but to prosecutors." *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406 (S.Ct. 2002)

## **JURY INVOLVEMENT IN SENTENCING**

### **Finding of Aggravating Factors in Capital Case Must be Determined By Jury**

The defendant was convicted of first-degree murder, conspiracy to commit armed robbery, and armed robbery. He was sentenced to death. On appeal, the Arizona Supreme Court affirmed. The United States Supreme Court reversed, holding that the Arizona death penalty scheme improperly empowered a trial judge in a capital case to determine the presence of aggravating factors required to be present by Arizona law in order for the death penalty to be imposed. *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (S.Ct. 2002)

### **Jury Involvement in Sentencing – Weighing of Aggravating and Mitigating Circumstances in Death Cases Not Factual Determination For Jury Under *Ring***

In a death penalty case, determining whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact or element of an offense that would have to be determined by the jury under the United States Supreme Court's decision in *Ring v. Arizona*, 122 S.Ct. 2428 (2002). *Ring* only requires that a jury, not the sentencing judge, make the factual determination that aggravating circumstances necessary for imposition of the death penalty exist. In this case, the jury found the existence of one aggravating circumstance – all that is required under Alabama law to sentence a defendant to death. The trial court's later determination that the murders were especially heinous, atrocious, or cruel, was found to be only a factor that had application in weighing the mitigating and aggravating circumstances. *Ex parte Waldrop*, 859 So.2d 1181 (Ala. 2002); *Lee v. State*, 889 So.2d 623 (Ala.Crim.App. 2003).

### **Apprendi Decision Applied to Alabama Law**

#### **Death Penalty**

#### **Apprendi Not Extended to Proof Prior Convictions**

The decision of the United States Supreme Court in *Ring v. Arizona*, 536 U.S. 584 (S.Ct. 2002), extending *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to capital sentencing, did not require proof beyond a reasonable doubt of aggravating factors of a prior conviction. *Ex Parte Smith*, 2003 WL 1145475 (Ala. 2003)

#### **Drug Sale Enhancements Need not be Alleged in Indictment**

The locale of drug sales that could result in application of the enhancement provisions of the 3-mile radius statutes does not have to be alleged in the indictment since it is not an element of the offense of distributing a controlled substance. Citing *Poole v State*, 846 So.2d 370 (Ala.Crim.App. 2001), the Court of Criminal Appeals reiterated, "We do not believe that the Supreme Court intended to impose presentment and indictment requirements on the individual states' rights to define criminal activity." In *Poole*, the

## **JURY INVOLVEMENT IN SENTENCING**

Alabama Court of Criminal Appeals held that *Apprendi* error (failure to submit fact increasing punishment, other than prior convictions, to a jury to be proved beyond a reasonable doubt, only invalidates the defendant's sentence, not the underlying conviction. The Court refused to adopt the defendant's position that facts elevating a sentence above the statutory maximum must be alleged in the indictment, advising that trial courts should submit 2 verdict forms to the jury – one addressing guilt on the charge (in this case, distribution of controlled substances), and the other whether the sale occurred within a three mile radius of a school and/or housing project.

*Tucker v. State*, 833 So.2d 668 (Ala.Crim.App. 2001)

### **Enhancements Based on Prior Convictions Not Affected**

In *Apprendi v. New Jersey*, 530 US 466 (2000), the United State Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The *Apprendi* Court specifically excluded from its holding proof of prior convictions necessary to invoke the habitual felony offender act.

The defendant in this case successfully argued that the enhancement of his sentence of distributing a controlled substance by 10 years pursuant to the 3-mile radius statutes (13A-12-250 and 270) should have been submitted to the jury and proven beyond a reasonable. The court declined to adopt the position that a fact elevating a sentence above the statutory maximum must be alleged in the indictment.

*Poole v. State*, 846 So.2d 370 (Ala.Crim.App. 2001)

### **Apprendi Decision Not Retroactively Applied**

Calloway was convicted as a habitual felony offender for unlawful distribution of a controlled substance and given a 20 year base sentence that was split by the trial court followed by 5 years on probation, with an additional 10 year imprisonment based on the enhancement provisions of §13A-12-250 and 270. The Court of Criminal Appeals held that (1) the trial court erred in splitting the defendant's sentence since the minimum he could receive was 30 years imprisonment; (2) the sentence enhancements for unlawful sale of a controlled substance within a 3 mile radius of a school or housing project did not have to be charged in the indictment and (3) *Apprendi* does not apply retroactively to cases on collateral review, citing *Sanders v. State*, 815 So.2d 590 (Ala.Crim.App. 2001). *Calloway v. State*, 860 So.2d 900 (Ala.Crim.App. 2002).

## **PRESENTENCE REPORTS**

### **Comments in PSI Report Did Not Deny Defendant Fair Sentence**

Noting that the findings of the trial court were clearly based on evidence presented during the trial and that they did not contain any inaccuracies, the Court of Criminal Appeals rejected the defendant's claim that he was denied a fair sentence because of alleged inaccurate comments made in the pre-sentence report. The Court noted, "Whatever the propriety of the comments in a pre-sentence report, it would be a rare case indeed where a probation officer's rhetoric could overwhelm the independent judgment of a sentencing court."

*Calhoun v. State*, 932 So.2d 923 (Ala.Crim.App. 2005).

**See § 13A-5-5, Code of Alabama 1975, as amended by Act 2006-218 requiring that an electronic pre-sentence or post-sentence investigation report be filed for all defendants convicted of a felony.**

## **POST CONVICTION REVIEW – RULE 32 PETITIONS**

### **Rule 32 ARCrP – Statute of Limitations Not Jurisdictional Bar; Equitable Tolling Available in Extraordinary Circumstances**

Addressing an issue of first impression, the Alabama Supreme Court held that the limitations period set forth in Rule 32.2(c), Ala. R.App. P., was not jurisdictional, and to interpret it otherwise would conflict with the constitutional provisions limiting the Court's ability to promulgate court rules that enlarge or restrict the jurisdiction of the circuit court. Since Rule 32.2(c) does not establish a jurisdictional bar, but is rather an affirmative defense, a trial court has the power to hear an untimely petition filed beyond the limitations period.

The Court noted that although the limitations provision is not a jurisdictional bar to the filing of a Rule 32 petition, it is mandatory and applies in all but the most of extraordinary circumstances. The Court made it clear that when a petition is time-barred on its face, the petitioner must bear the burden of demonstrating in his petition that there are extraordinary circumstances justifying the application of the doctrine of equitable tolling. "A petition that does not assert equitable tolling, or that asserts it but fails to state any principle of law or any fact that would entitle the petitioner to the equitable tolling of the applicable limitations provision, may be summarily dismissed without a hearing. *Ex parte Ward*, 1051818, 2007 WL 1576054 (Ala., June 1, 2007)



## **POST CONVICTION REVIEW – RULE 32 PETITIONS**

### **Denial of Due Process Rights – Clerk’s Failure to Notify Rule 32 Petitioner’s Attorney**

In this case, the Court of Criminal Appeals held that the petitioner’s due process rights had been denied when his counsel was not served with copies of any of the orders issued by the circuit court or a copy of the State’s response to his Rule 32 petition. The petitioner alleged that neither he nor his counsel was aware, until after the time for filing a motion to reconsider had passed, that the State had responded to the Rule 32 petition or that the trial court had denied the petition.

Citing Rule 34.4 of the Alabama Rules of Criminal Procedure, the Court noted that notice of hearings are required to be served on the defendant, and if represented by counsel, also, on counsel. For all other notices or documents where the defendant is represented by counsel, service must be made on the attorney of record. Holding that the State’s response and the circuit court’s orders should have been served on counsel, not the petitioner, and that failure to do so violated the petitioner’s due process rights, the case was reversed and remanded.

*Abdeldayem v. State*, 2007 WL 1866119 (Ala.Crim.App. 6/29/07).

### **Rule 32 ARCrP – Excessive Sentence Was Illegal Sentence and Jurisdictional Claim That Was Not Procedurally Barred**

This was a case in which a Rule 32 petitioner challenged his guilty plea alleging that it was not voluntarily entered because he was not advised of the correct minimum and Maximum sentences. Appealing from the denial of his petition, he claimed that the sentence he received was illegal because it exceeded the maximum allowed by law; i.e., it was not subject to enhancement under the Habitual Felony Offender Act. Holding that the circuit court erred in dismissing the petitioner’s claims as procedurally barred, the Court noted that these were claims challenged the legality of a sentence and were therefore jurisdictional, not subject to procedural bars, and could be raised at any time.

*Kelley v. State*, 2007 WL 1866749 (Ala.Crim.App. 6/29/07)

### **Rule 32.2(b) A.R.Crim.P. – Successive Petitions for Post-Conviction Review**

Pursuant to Rule 32.2(b) New claims in subsequent petitions are barred as being successive unless the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard and failure to entertain the petition will result in a miscarriage of justice. This Opinion, *Whitt v. State*, 827 So.2d 869 (Ala.Crim.App.2001), overruled *Blount v. State*, 572 So.2d 498, to the extent that it held that a subsequent petition on different grounds was not successive unless a prior petition was decided on its merits.

*Note:* Rule 32.2 (a)(4) was amended by the Supreme Court by Orders dated March 22, 2002 and July 1, 2002, to expressly incorporate this holding into the rule. Other amendments were made to the rule, specifically, Rule 32.2(c) was amended to provide for a 1 year statute of limitation (previously 2 years) and subsection (d) was added to

## **POST CONVICTION REVIEW – RULE 32 PETITIONS**

provided that claims of ineffective assistance of counsel could not be raised in a successive petition but must be raised as soon as practicable, either at trial, on direct appeal or in the first Rule 32 petition. These amendments become effective August 1, 2002, for all defendants except those in which a certificate of judgment was issued by the Court of Criminal Appeals between August 1, 2001 and August 1, 2002, in which event those defendant have until August 2003 to file a Rule 32 petition.

*Whitt v. State*, 827 So.2d 869 (Ala.Crim.App. 2001)

### **Post-Conviction Remedy - Rule 32 ARCrP – Procedural Bar of Constitutional Claims**

The defendant filed a Rule 32 petition challenging his sentence to life imprisonment without possibility imposed pursuant to the Habitual Felony Offender Act. The defendant stole a bicycle from a screened porch while the owner was home and was charged with first-degree burglary, a Class A felony. He was sentenced as a habitual offender based on five prior convictions: one for first-degree receiving stolen property and four for burglary in the third degree, none of which was a Class A felony. The Alabama Supreme Court affirmed the judgments of the trial court and Court of Criminal Appeals denying post-conviction relief, holding that the petitioner's claim that his sentence was excessive and disproportionate to the crime for which he was convicted was a constitutional claim, rather than a jurisdictional claim, and was thus procedurally barred under Rule 32. Although the Court noted that the application of the habitual felony offender act in this case "has produced what many might consider a harsh result," it stated that this issue was one that was more appropriately addressed by the Legislature.

*Ex parte Sanders*, 792 So.2d 1087 (Ala. 2001).

### **Rule 32 – Jurisdictional Claims Can Also Be Precluded on Successive Petition Grounds**

An illegal sentence imposed based on the Habitual Felony Offender Act presents a jurisdictional claim which is not precluded by the limitations period or the rule against successive petitions. "Although our cases have previously stated that jurisdictional claims cannot be precluded as 'successive,' that exception to Rule 32.2(b) applies only to jurisdictional claims not previously raised and adjudicated on the merits."

The Supreme Court held that because the trial court adjudicated the Rule 32 petitioner's jurisdictional claim on the merits in a prior petition, he was precluded from reasserting that jurisdictional claim in a successive petition. *Ex parte Trawick*, 2007 WL 625834 (Ala. March 2, 2007).

### **Verification Not Jurisdictional Defect**

The failure to comply with the verification requirements of Rule is not a defect that operates to deprive the circuit court of subject-matter jurisdiction to consider the merits of a Rule 32 petition; therefore, the defect is waived if not presented to the court.

*Smith v. State*, 918 So.2d 141 (Ala.Crim.App. 2/25/05).

## **PROBATION - PROBATION REVOCATION**

### **Probation Revocation – Right to Counsel; Court must Determine Prior to Revocation**

Holding that where the record did not establish that the trial court apprised the probationer that he had a right to counsel or that the court had made an initial determination as to whether he was entitled to have appointed counsel for his revocation proceedings, the Court of Criminal Appeals remanded the case to the circuit court with instructions to make specific findings if the probationer was entitled to appointed counsel. Citing Rules 27.5 and 27.6 of the Rules of Criminal Procedure, the Court held “Although a probationer does not have an unqualified right to counsel at a probation-revocation hearing..., it is incumbent upon the sentencing court to determine whether the probationer has such a right before revoking probation.” Pursuant to Criminal Rule 27.6(b), counsel must be appointed to represent an indigent probationer upon request “(1) If the probationer makes a colorable claim that the probationer has not committed the alleged violation of the conditions or regulations of probation or the instructions issued by the probation officer; or (2) Even when the violation is a matter of public record or is uncontested, if there are substantial reasons that justify or mitigate the violation and that may make revocation inappropriate, and the reasons are complex or otherwise difficult to develop or present.”

*Turner v. State*, 2007 WL 1519034 (Ala.Crim.App. 5/25/07).

### **Probation Revocation – Written Order; Violation of Implied Condition**

Court of Criminal Appeals upheld the appellant’s revocation of probation based on a positive drug screen, even though this occurred prior to the probation officer going over the express terms of his probation with him. The Court held that refraining from committing further criminal offenses is an implied condition of every probationary sentence and revocation was proper even prior to the defendant’s receipt and acknowledgement of the written probation order. *Croshon v. State*, 2007 WL 624559 (March 2, 2007)

### **Probation Revocation – Prior to Beginning of Probation Portion of Sentence**

If a defendant commits a crime while under a probationary sentence, although prior to the effective date of the probationary portion of his sentence, even if not yet expressly prescribed by the sentencing court, revocation of probation is appropriate. A condition implicit in every suspended or probationary sentence is that the defendant will not commit another criminal offense while under such sentence. *Wilcox v. State*, 395 So.2d 1054 (Ala. 1981).

## **PROBATION - PROBATION REVOCATION**

### **Probation Revocation – Based on Breach of Plea Agreement**

Based on defendant's promise to testify against a co-defendant, the prosecutor negotiated a plea agreement, whereby the defendant would receive a 20 year sentence, split 5 to serve, followed by 5 years probation. Finding that suspension of the sentence was conditioned on the defendant providing testimony as promised; the Court of Criminal Appeals held that the trial court properly revoked probation when defendant failed to comply with the conditions of his plea agreement.

*Adams v. State*, 2006 WL 3124462 (Ala.Crim.App. 2006).

### **Probation Revocation Hearing – Same Court**

Rule 27.6(a) of the Alabama Rules of Criminal Procedure does not require that a probation revocation hearing be conducted by the sentencing judge.

*Phillips v. State*, 936 So.2d 1101 (Ala.Crim.App. 2006).

### **Formal Discharge of Probation**

Probation may be continued until its conditions are fulfilled and the court issues a formal discharge. The probationary period may be tolled and its term extended by the court, provided that the probation period does not exceed the statutory maximum. Rule 27.3(a) Ala.R.Crim.P. Revocation proceedings must begin within the maximum period permitted by law. *G.L.C. v. State*, 910 So.2d 163 (Ala.Crim.App. 2005).

### **Written Order Mandatory Prerequisite to Revocation**

Rule 27.6(e) of the Alabama Rules of Criminal Procedure requires that all conditions of probation be incorporated into a court's written order and that a copy of the order be given to the probationer. This requirement is mandatory and probation cannot be revoked for violations if the probationer did not receive a written copy of the conditions or regulations of probation. Rule 27.6(e) is specific in requiring that the conditions be reduced to writing and provided to the defendant; oral instructions are insufficient to fulfill these requirements.

*D.D. v. State*, 855 So.2d 1135 (Ala.Crim.App. 2003); *Owens v. State*, 887 So.2d 1015 (Ala.Crim. 2004).

In this case the defendant was convicted of first degree burglary and first degree theft and originally sentenced to 20 years imprisonment for each, with the sentences to run concurrently. The sentences were then suspended; a five-year "reverse-split" sentence was imposed for each conviction, with suspension conditioned on the defendant successfully completing boot camp and two years of supervised probation. Five months later the trial court granted the defendant's application for youthful-offender status and released him on supervised probation, however, the judge failed to resentence him according to the provisions of the Youthful Offender Act (§ 15-19-6), which limits incarceration to a maximum of three years. When the defendant subsequently violated conditions of his probation, the trial court revoked his probation and reinstated his original 5-year prison sentence. The Court of Criminal Appeals reversed, holding that because the original sentence had been voided by the subsequent grant of youthful

## **PROBATION - PROBATION REVOCATION**

offender status and the trial court failed to resentence the defendant as a youthful offender, every proceeding the court took, including its attempt to revoke probation was void.

*Warwick v. State*, 843 So.2d 832 (Ala.Crim.App. 2002).

### **Probation Revocation – Sentence**

It is within the sound discretion of the trial judge whether to impose the original sentence or some other disposition as a sanction for a probation violation.

*Holden v. State*, 820 So.2d 158 (Ala.Crim.App. 2001); See Rule 27.6(d) Rules of Criminal Procedure.

### **No Credit for Time Served on Probation**

A defendant whose probation is revoked is not entitled to credit on his sentence for the time served on probation.

*Johnson v. State*, 778 So.2d 252 (Ala.Crim.App. 2000)

### **Initiation of Revocation Proceeding**

State may initiate proceeding to revoke probation, even when the proceedings were not initiated until after the date probation was originally scheduled to end since probationer had not satisfactorily fulfilled the conditions of his probation or received a formal discharge from the trial court.

*Sherer v. State*, 486 So.2d 1330 (Ala.Crim.App. 1986).

### **Increasing Split Sentence Upon Revocation**

A split sentence may be imposed upon revocation of probation, provided that the time to serve does not exceed the maximum allowed (3 years or 5 years).

*Phillips v. State*, 755 So.2d 63 (Ala.Crim.App. 1999); See also, *Havis v. State*, 710 So.2d 527, 528-29 (Ala.Crim.App. 1997).

On revocation of probation in which the defendant was originally sentenced to 5 years imprisonment, the sentence was suspended and the defendant was placed on probation for 5 years, the trial court had authority to “split” the defendant’s original sentence and require him to serve three years in confinement without the benefit of good time or parole. *Parker v. State*, 648 So.2d 653 (Ala.Crim.App. 1994).

Where a defendant that is sentenced to 15 years or less with less than three years to serve under the split sentence statute, the court has authority upon revocation to add an additional period of confinement, so long as the total period of confinement does not exceed three years.

*Smitherman v. State*, 2006 WL 2788978 (Ala.Crim.App. 9/29/06); *Dixon v. State*, 912 So.2d 292 (Ala.Crim.App. 2005).

## **PUBLIC TRIAL**

### **Closure of Courtroom – Sixth Amendment Right to Public Trial**

Trial court erred in closing courtroom to all except jury and essential parties in a case involving sodomy 1<sup>st</sup>. Citing § 12-21-202, the Alabama Supreme Court held that the Court of Criminal Appeal's reliance on this statute was misplaced since this statute only allows a trial court to close a courtroom to spectators when the defendant is being tried for rape. While the second portion of this statute references "all other cases where the evidence is vulgar, obscene or relates to the improper acts of the sexes and tends to debauch the morals of the young," the Court held that this provision is only applicable to civil trials, citing Rule 9.3 Ala.R.Crim.P. and the fact that this provision refers to plaintiffs and defendants.

Determining that this was a total closure of the courtroom rather than a partial closure, the Alabama Supreme Court reviewed the test set out in *Waller v. Georgia*, 467 U.S. 39 (1984) for the proper closure of a courtroom, noting that even for a temporary closure of the courtroom, this test must be satisfied.

*Ex parte Easterwood*, 2007 WL 1576107 (Ala. 6/1/07).

## **RESTITUTION**

### **Interest Authorized**

In a case involving the theft of over \$200,000 from the City of Decatur by a former employee, the trial court sentenced the defendant to 15 years in the penitentiary, split the sentence and ordered her to serve 48 hours in the county jail, followed by 15 years probation. In addition payment of restitution was ordered in the amount of \$200,000 plus 12% interest amortized over a 15-year period. Addressing a question of first impression, the Alabama Supreme Court held that pursuant to the provisions of the Alabama Restitution to Victims of Crimes Act (codified at §§ 15-18-65 to 78, Ala.Code 1975), a trial court can order a defendant to pay interest on an amount ordered as restitution. Although the Court held that the trial court correctly imposed the statutory 12 percent rate of interest, because the monthly restitution payments ordered were obviously beyond the defendant's financial means, the case was remanded for the court to consider the defendant's ability to pay.

*Ex parte Fletcher*, 849 So.2d 900 (Ala. 2001).

## **RIGHT TO COUNSEL**

### **Misdemeanant's Right to Appointed Counsel – Test is If Imprisonment Given Now or Later as a Result of Probation Revocation**

This case involved a defendant, without council, was convicted of misdemeanor assault and sentenced to 30 days in jail which the trial court suspended and placed the defendant on 2 years unsupervised probation. The United States Supreme Court held that the 6<sup>th</sup> Amendment does not permit activation of a defendant's sentence upon an indigent defendant's violation of the terms of his probation when the State did not provide him with counsel during the prosecution of the offense for which he is imprisoned.

Rejecting the State's argument that counsel should only be required, if at all, at the probation revocation stage, the Court noted that "[i]n Alabama the probation revocation hearing is an informal proceeding, at which the defendant has no right to counsel, and the court has no obligation to observe customary rules of evidence. More significant, the defendant may not challenge the validity or reliability of the underlying conviction." The argument advanced by amicus brief that Alabama (and other states) could not afford the costs resulting from the court's ruling, the Court seemed to support the expanded use of prosecutor's pre-trial diversion programs in stating, "those jurisdictions have recourse to the option of pretrial probation, whereby the prosecutor and defendant agree to the defendant's participation in a pretrial rehabilitation program which includes conditions typical of post-trial probation, and the adjudication of guilt and imposition of sentence for the underlying offense occur only if the defendant breaches those conditions. This system reserves the appointed counsel requirement for the few cases in which incarceration proves necessary...while respecting the constitutional imperative that no person be imprisoned unless he was represented by counsel." (citations omitted).

*See United States v. Perez-Marcias*, 327 F.3d 384 (5<sup>th</sup> Cir. 2003), in which the Fifth Circuit Court of Appeals affirmed the District Court's holding that a prior misdemeanor conviction in which the defendant was not provided council but received probation could be used to enhance his current offense to a felony. Distinguishing the facts of this case from those in *Alabama v. Shelton*, the court noted that Shelton involved a defendant who received a suspended sentence and, was thus, given a term of imprisonment, while this case involved a defendant who received a "stand-alone" sentence of probation.

*Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764 (S.Ct. 2002)

## **SEX OFFENSES**

### **Juvenile Sex Offenders – Assessment Mandatory Prior to Release**

A trial judge has no authority to release juvenile sex offenders from probation until he undergoes a sexual offender assessment as mandated by § 15-20-28.

In *D.B.Y. v. State*, 910 So.2d 820(Ala.Crim.App. 2005), the Alabama Court of Criminal Appeals held that a trial judge could not release a juvenile sex offender granted YO status from probation until he underwent a sexual-offender risk assessment. Citing § 15-20-20.1 and 15-20-28, the Court opined that a sexual offender risk assessment is mandatory and a juvenile sex offender cannot be removed from supervision of the court until the treatment provider has filed a risk assessment with the court.

*Ex parte State (In Re D.B.Y. v. State)*, 910 So.2d 820 (Ala.Crim.App. 2005).

### **Mens Rea – Allowing Display of Genitals**

Because § 13A-12-200.11 which provides for the offense of allowing the display of genitals, etc., for entertainment purposes does not exclude any of the culpable mental states, it may be committed intentionally, knowingly, recklessly, or as the result of criminal negligence. The applicable mental state will depend on the facts of each case. Statute not unconstitutional on vagueness grounds. *Scott v. State*, 917 So.2d 159 (Ala.Crim.App. 2005)

### **Display of Genitals Separate Acts**

Each time a “peep show” is performed in violation of § 13A-12-200.11, it is a separate criminal act. *Scott v. State*, 917 So.2d 159 (Ala.Crim.App. 2005)



## **SPECIFIC PENALTY PROVISIONS**

### **Capital Murder – Elements Also Considered As Aggravating Circumstances**

Although convictions for both murder made capital because it was committed during the course of a burglary and also for burglary violates double jeopardy principles, in this case the Court of Criminal Appeals held that the trial court properly treated kidnapping, robbery and burglary both as elements of capital murder and as aggravating circumstances.

*Brooks v. State*, 2007 WL 625020 (Ala.Crim.App. 2007).

### **Habitual Felony Offender Act**

#### **Section 15-22-27.1 Denying Parole To Repeat Serious Offender Not Implicitly Repealed By HFOA**

Section 15-22-27.1 which provides that “[a]ny person convicted of any act, or attempt to commit the act of murder, rape, robbery or assault with a deadly weapon, the commission of which directly and proximately resulted in serious physical injury to another and the commission of which follows within five years a previous conviction of another felony, or attempt thereof, resulting in serious physical injury to another, shall upon conviction serve such sentence as may be imposed without the benefit of parole, notwithstanding any law to the contrary,” was not implicitly repealed when the Legislature enacted the Habitual Felony Offender Act.

*Moore v. State*, 739 So.2d 536 (Ala.Crim.App. 1998), overruling *Goldsmith v. Alabama Board of Pardons and Paroles*, 724 So.2d 80 Ala.Crim.App. 1998).

#### **Not Applicable to Child Abuse**

The Habitual Felony Offender Act cannot be applied to enhance a conviction for child abuse under § 26-15-3.

*Kennedy v. State*, 929 So.2d 515 (Ala.Crim.App. 2005).

#### **Pardon Convictions Cannot Be Used as Enhancements**

Reversing the Court of Criminal Appeals holding that six prior felony convictions for which the petitioner had received a full and unconditional pardon could be considered to enhance his subsequent conviction for robbery pursuant to the Habitual Felony Offender Act, the Alabama Supreme Court held that ***pardoned convictions cannot be used to enhance a sentence under the Habitual Felony Offender Act.***

*Ex Parte Casey*, 852 So.2d 175 (Ala. 2002).

## **Habitual Felony Offender Act**

### **Prospective Application of the Amendments to the HFOA (Prior to Retroactive Amendment)**

Defendant sought post conviction relief following amendment of the HFOA, alleging his life without parole sentence under the Act violated equal protection. The Supreme Court held that the defendant's right to equal protection was not violated by prospective application of the Act. Noting that the Legislature properly may give only prospective operation to statutes that lessen the punishment for a particular offense to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment, the Court held that a reduction of sentences only prospectively from the date a new sentencing statute takes effect was not a denial of equal protection. *Ex parte Zimmerman*, 838 So.2d 408 (Ala. 2002).

### **Jurisdiction vested by Legislature for Reconsideration of Sentence**

Although a trial court usually loses jurisdiction to modify a sentence in a criminal case 30 days after sentencing, by requiring that the amendments to the Habitual Felony Offender statute be applied retroactively, the Legislature vested jurisdiction in the sentencing judge or the presiding judge to reopen a case more than 30 days after a defendant has been sentenced. However, this exception is applicable to only "two narrowly defined classes of habitual offenders: those who had been sentenced to life imprisonment without the possibility of parole under the mandatory provisions of the HFOA upon conviction of a Class A felony with no prior Class A felony convictions; and those who had been sentenced to life imprisonment under the mandatory provisions of the HFOA upon conviction of a Class B felony."

*Holt v. State*, 2006 WL 510784 (Ala.Crim.App. 2006), citing *Kirby v. State*, 899 So.2d 968 (Ala. 2004).

### **Kirby Motion – Jurisdiction Lost to Reconsider Modified Sentence**

In the instant case, the trial court attempted to reconsider a modified sentence of life imprisonment previously granted pursuant to a Kirby motion when he was provided evidence that the petitioner was a violent offender. Reversing the circuit court's order granting the State's motion to reconsider, the Court of Criminal Appeals held that the trial court lacked subject matter jurisdiction to reinstate the original life imprisonment without parole sentence since this order was filed later than 30 days from the granting of the original Kirby motion. In a footnote, the Court stated that there appears to be no provision under Alabama law for the State to seek appellate review of a ruling granting a §13A-5-9.1 Kirby motion and that the State's only remedy would be by filing a mandamus petition within seven days of the circuit court's ruling.

*Gates v. State*, 2007 WL 1228017 (Ala.Crim.App. 4/27/07).

## **Habitual Felony Offender Act**

### **Kirby Motion Applicable to Certain Felons Convicted of Class B Felony Offense and Sentenced to Life Imprisonment**

Trial court mistakenly concluded that the petitioner who was convicted of a Class B felony with three or more prior conviction was not eligible to file a *Kirby* motion for reconsideration of his sentence. As the Court noted, the amended provisions of the Habitual Offender Act, retroactively applied by §13A-5-9.1, is limited to two narrowly defined classes of habitual offenders: “those who have been sentenced to life imprisonment without the possibility of parole under the mandatory provisions of the HFOA upon conviction of a Class A felony with no prior Class A felony convictions; *and those who have been sentenced to life imprisonment under the mandatory provisions of the HFOA upon conviction of a Class B felony.* Moreover, of those habitual offenders, the judge can resentence only those who are nonviolent offenders (which)...the state’s trial judges have the authority under the statute to determine....” Citing *Kirby v. State*, 899 So.2d 968, 974 (Ala.2004).

*Mayfield v. State*, 2007 WL 866201 (Ala. Crim.App. 3/23/2007).

### **Kirby Reconsideration – Determination Whether Defendant is Nonviolent to be Made by Judge**

Necessarily included in the trial court’s subject-matter jurisdiction to adjudicate *Kirby* motions filed pursuant to §13A-5-9.1, is the authority to determine if a defendant is a nonviolent offender. Thus, the trial court decides which offenders are nonviolent convicted offenders within the scope of §13A-5-9.1 “as opposed to only those cases where it is ultimately determined that the inmate is a nonviolent convicted offender.” Murdock, Justice (concurring specially).

*Ex parte Butler*, 2007 WL 779148 (Ala. 3/16/2007).

### **Void Judgment Does Not Count Toward Successive Petition Bar**

The petitioner’s first Kirby motion was denied by a judge other than the sentencing judge or presiding judge (and was prior to the effective date of Act 2007-457 supra). Holding that the judge ruling on the motion lacked jurisdiction and that this was a void judgment, the Alabama Supreme Court held that any rule limiting the defendant to one motion seeking a reconsideration of his sentence pursuant to §13A-5-9.1 was not applicable. The Court held that the rule announced in *Wells v. State*, 941 So.2d 1008 (Ala.Crim.App. 2005) prohibiting successive Kirby motions for sentence reconsideration, did not apply when the first motion for reconsideration was denied by a judge not the sentencing judge or presiding judge. (applicable to rulings prior to June 14, 2007, before the effective date of 2007-457)

*Ex parte Jenkins*, 2007 WL 779141 (Ala.3/16/07).

## **Habitual Felony Offender Act**

### **New Statute Authorizes Reconsideration of Certain HFO Sentences**

In *Ex parte State of Alabama (In re Junior Mack Kirby)*, the Alabama Supreme Court held that in passing Act 2001-977, the Legislature gave retroactive application of § 13A-5-9, vesting jurisdiction in the sentencing judge or the presiding judge to reopen a case more than 30 days after sentencing. The Court noted that retroactive application of the HFOA amendment is only applicable to a narrowly defined group of inmates. Those inmates are those who fit the following criteria:

- (1) Those who were sentenced under the Habitual Offender Act,
- (2) prior to May 26, 2000,
- (3) who are currently serving either a sentence of “life without the possibility of parole” and none of the prior convictions used for enhancement purposes were Class A felonies or who are serving a sentence of “life” for a Class B Felony, and
- (4) who are determined, *by the sentencing or presiding judge* to be a non-violent offender.

*Kirby v. State*, 899 So.2d 968 (Ala. 2004).

### **Kirby Motions for Modification -Limited Appellate Review**

Although orders entered on §13A-5.9.1 are appealable, appellate review of such orders is limited. If a court chooses to resentence a petitioner, imposing a sentence that is authorized, the appellate courts will not second guess that court’s discretionary decision.

### ***No Filing Fee or Indigency Determination Required***

“Because a §13A-5-9.1 motion involves reopening an existing case, a circuit court is not required to grant a petitioner indigent status or to require a petitioner to pay a filing fee before it can obtain jurisdiction over the case.”

...

“[A] § 13A-5-9.1 motion involves reopening an existing case in which there has been a conviction and sentence, for possible re-sentencing. Logically, then, any order either granting or denying a request for reconsideration of a sentence would be appealable.

“[T]he only inmates who would be eligible for reconsideration of their sentence(s), in the discretion of the circuit court, are (1) nonviolent offenders with three prior felony convictions who were subsequently convicted of a Class B felony and sentence to life in prison pursuant to § 13A-5-9(c)(2), Ala.Code, 1975, and (2) nonviolent offenders with three prior felony convictions, none of which was a Class A felony, who were subsequently convicted of a Class A felony and sentenced to life without the possibility of parole pursuant to § 13A-5-9(c)(3), Ala.Code, 1975.”

*Prestwood v. State*, 915 So.2d 580 (Ala.Crim. App. 2005)

## **Habitual Felony Offender Act**

### **Evaluation of Kirby Motions -Three Step Process**

Sentencing Courts were advised to conduct a three-step process when evaluating motions filed under §13A-5-9.1:

- 1) Determine if the motion was filed in the appropriate court and whether it has been assigned to the appropriate judge (sentencing judge or presiding judge), *Ex parte Sandifer*, 2005 WL 3507967 (Ala.Crim.App. 2005);
- 2) Whether the motion is the inmates first motion or successive motion, since no jurisdiction to grant second or successive §13A-5-191 motions, *Wells v. State*, 2005 WL 2810756 (Ala.Crim.App. 2005);
- 3) Whether the inmate is eligible for reconsideration –
  - a. Must have been sentenced before 5/25/2000 under the habitual felony offender Act;
  - b. As a felony offender with three prior convictions (none of which was a Class A felony) to life imprisonment without parole pursuant to § 13A5-9(c)(3)  

***or***

life imprisonment pursuant to §13A-5-9 (c)(2).
  - c. If the inmate is a nonviolent offender.

*Holt v. State*, 2006 WL 510784 (Ala.Crim.App. 2006).

### **Eligibility for Reconsideration of Sentence – Prior Parole Not Factor**

There are three requirements for eligibility to have a habitual offender sentence reconsidered under the statute providing for retroactive application of the amendment to the HFOA: 1) the inmate was sentenced before the effective date of the amendment; 2) the inmate was sentenced to life imprisonment without the possibility of parole on a conviction for a Class A felony and had no prior Class A felony convictions or was sentenced to life imprisonment on a conviction for a Class B felony, and 3) the inmate is a nonviolent convicted offender. The defendant's status as a previous parolee is irrelevant to the trial court's initial determination of whether he is eligible to have his habitual offender sentence reconsidered pursuant to §13A-5.9.1.

*Ferrell v. State*, 944 So.2d 162 (Ala.Crim.App. 2006).

### **No Right To Counsel**

A motion filed pursuant to § 13A-5-9.1 is not considered 'a critical stage of the proceeding' that requires the appointment of counsel.

*Hastings v. State*, 938 So.2d 974 (Ala.Crim.App. 2005).

## **Habitual Felony Offender Act**

### **Kirby Eligible Offenders Must be Non-Violent**

Although §13A-5-9.1 grants the sentencing judge or presiding judge jurisdiction to consider a § 13A-5-9.1 motion, by its very language, §13A-5-9.1 grants the sentencing judge or presiding judge jurisdiction to resentence only those offenders that are eligible for resentencing, i.e., nonviolent offenders who were sentenced pursuant to § 13A-5-9(c)(2) or (c)(3). In this case, the defendant was convicted of Robbery in the first degree, where one of the elements is being armed with a deadly weapon. The Court of Criminal Appeals held that he was a violent offender and thus, not eligible for a reduced sentence under *Kirby*.

*Sanders v. State*, 934 So.2d 432 (Ala.Crim.App. 2005).

### **Trial Judge Must Make Non-Violent Determination Based on Totality of Information**

Elaborating on its holding in *Sanders v. State*, 934 So.2d 432 (Ala.Crim.App. 2005), the Court of Criminal Appeals held that whether an inmate was a “nonviolent convicted offender” who would be eligible to have his sentence modified through a *Kirby* motion, must be based on the totality of the circumstances that the court has before it when ruling on the motion to reconsider his sentence. The Court emphasized that the fact that a crime is statutorily defined as a “violent offense,” is not binding on a circuit court’s determination, “although it is a relevant and appropriate consideration.” *Holt v. State*, 2006 WL 510784 (Ala.Crim.App. 2006).

### **Class B Felony Offenders Under Kirby**

Persons sentenced to life imprisonment under the Habitual Felony Offender statute who have been convicted of a Class B felony and have at least 3 prior felony convictions are eligible to file a motion for reconsideration of their sentence under § 13A-5-9.1.

*Mack v. State*, 925 So.2d 999 (Ala.Crim.App. 2005).

### **Mislabeling Kirby Motion Not fatal**

Substance controls over style, therefore a mislabeled Kirby motion should be considered by the sentencing court.

*Malloy v. State*, 908 So.2d 1048 (Ala.Crim.App. 2004).

## **Habitual Felony Offender Act**

### **\*Filing and Judge to Reconsider**

***(Applicable To Petitions Filed Prior to June 14, 2007).***

*Kirby* motions must be filed in the court of original conviction and only the “sentencing judge or presiding judge” of that circuit has jurisdiction to review the motion.

*Dailey v. Alabama Board of Pardons and Paroles*, 908 So.2d 311 (Ala.Crim.App. 2004), Cert denied by Alabama Supreme Court March 11, 2005.

### **\*Presiding Judge Cannot Appoint Another Circuit Judge to Preside Over Motions**

***(Applicable To Petitions Filed Prior to June 14, 2007).***

The Presiding circuit court judge has no authority to appoint a special presiding judge to preside over motions to reconsider sentences under the retroactive amendment to the Habitual Felony Offender Act. According to §13A-5-9.1 only the sentencing judge or the presiding judge has the authority to reconsider sentences for retroactive application of the HFOA amendment.

*Ex parte Sandifer*, 925 So.2d 290 (Ala.Crim.App. 2005).

### **\*Filing Is In Court of Original Conviction By Presiding or Sentencing Judge- Transfer**

A motion for reconsideration of a sentence pursuant to retroactive amendment to Habitual Felony Offender Act (HFOA) must be filed in the court of original conviction, and only the sentencing judge or the presiding judge of that circuit has jurisdiction to review the motion; because only the sentencing judge or the presiding judge of the circuit in which the inmate was convicted and sentenced has jurisdiction to reconsider the sentence, a motion filed in the wrong circuit court should be transferred to the court of original conviction for appropriate disposition.

*Burns v. State*, 908 So.2d 1045 (Ala.Crim.App.,2004).

**\* Note: With the passage of Act 2007-457 amending §13A-5-9.1, petitions filed on or after June 14, 2007, the Act’s effective date, if the original sentencing judge is no longer in office, the presiding circuit judge may appoint any circuit judge to consider a *Kirby* petition.**

### **Successive Kirby Motions Prohibited**

“[O]nce a circuit court has considered one motion for reconsideration of sentence filed by a defendant in a particular case, the defendant’s rights with regard to that case will have been sufficiently safeguarded. Thereafter, the circuit court will not have jurisdiction to consider any second or successive motions for reconsideration filed by that defendant in that particular case. Instead, it should summarily deny any such motion.”

*Wells v. State*, 941 So.2d 1008 (Ala.Crim.App. 2005);

## **Habitual Felony Offender Act**

### **Void Judgment Does Not Count Toward Successive Petition Bar**

The petitioner's first Kirby motion was denied by a judge other than the sentencing judge or presiding judge (and was prior to the effective date of Act 2007-457 supra). Holding that the judge ruling on the motion lacked jurisdiction and that this was a void judgment, the Alabama Supreme Court held that any rule limiting the defendant to one motion seeking a reconsideration of his sentence pursuant to §13A-5-9.1 was not applicable. The Court held that the rule announced in *Wells v. State*, 941 So.2d 1008 (Ala.Crim.App. 2005) prohibiting successive Kirby motions for sentence reconsideration, did not apply when the first motion for reconsideration was denied by a judge not the sentencing judge or presiding judge. (applicable to rulings prior to June 14, 2007, before the effective date of 2007-457)

*Ex parte Jenkins*, 2007 WL 779141 (Ala.3/16/07).

### **Only Prior Convictions Apply**

Convictions occurring after commission of the offense for which the defendant is being sentenced cannot be used to enhance punishment under the Habitual Felony Offender Act. *Ex parte Peterson*, 466 So.2d 984, 986 (Ala.1984); *Hamilton v. State*, 635 So.2d 911 (Ala.Crim.App. 1993); *Bridges v. State*, 563 So.2d 13 (Ala.Crim.App. 1989).

### **Notice to Defendant**

Sentencing a defendant within 15 minutes of his receiving notice of the state's intent to proceed under the provisions of the Habitual Felony Offender Act is unreasonable.

*Ex parte Crews*, 797 So.2d 1119 (Ala. 2000).

## **Split Sentencing Statute**

### **Mandatory Minimums Can be Suspended After Statute Amended to Apply to Sentences of 20 years or Less**

The amendment to Alabama's split sentencing statute (effective 5/25/01) supersedes the prohibitions against probation of the 5 year mandatory enhancement provisions in § 13A-12-250 and § 13-12-270 for the sale of drugs within 3 miles of a school or housing project and allows a trial court to suspend sentences of 20 years or less.

In *Soles*, the Court of Criminal Appeals held that Alabama's split sentencing statute (§ 15-18-8), as last amended, allows a trial court to suspend a sentence imposed upon application of the five year enhancement statutes for person's convicted of the unlawful sale of a controlled substance within three miles of a school or public housing project. Although the *Soles* case only involved enhancements pursuant to the 3-mile radius statutes, applying the same rationale to other enhancement statutes (firearm enhancement,



### **Split Sentencing Statute**

domestic violence, hate crimes, DUI, enticing a child to enter a vehicle, house, etc., and drug trafficking), would apparently lead to the same conclusion because the amendment of the split sentencing statute was the latest expression of the Legislature on the subject.

*Soles v. Alabama*, 820 So.2d 163 (Ala.Crim.App. 2001); *Tucker v. State*, 933 So.2d 668 (Ala.Crim.App. 2001).

### **Application Discretionary**

Although *Soles* held that § 15-18-8(a)(1), as amended, *allows* a trial court to suspend a sentence imposed pursuant to § 13A-12-250 or 13A-12-270, neither *Soles* nor amended § 15-18-8 requires a trial court to do so. *Moore v. State*, 871 So.2d 106 (Ala.Crim.App. 2003)

Conner was convicted of the unlawful sale of a controlled substance and sentenced as a habitual felony offender to 20 years imprisonment that was split with 3 years to serve. The trial judge enhanced the sentence pursuant to § 13A-12-250 and 13A-12-270 because the sale occurred within 3 miles of a school and housing project, with two 5-year sentences to running consecutively with the 20-year sentence and with each other.

In an opinion issued March 1, 2002 (now withdrawn), the Court of Criminal Appeals erroneously remanded the case to the trial court for resentencing to allow the trial court the opportunity to split or suspend the enhancements utilizing its discretion as noted in *Soles*. On remand the Court recognized that the defendant's original sentence was erroneous because the minimum sentence he could receive was 30 years imprisonment that could not be split. The Court noted that it had "consistently treated sentences imposed pursuant to §13A-12-250 and §13A-12-270 as enhancements to a base sentence and, thus, as part of a single aggregate sentence for an offense. *State v. Corley*," 831 So.2d 59 (Ala.Crim.App.2001), [rehearing denied 1/25/02, certiorari denied 5/22/02]. The split sentencing statute could not apply since the minimum sentence exceeded 20 years imprisonment.

As a separate issue the Court rejected the defendant's contention that the Court erred in amending the indictment to charge the enhancements. Citing *Poole v. State*, 2001 WL 996300 (Ala.Crim.App. 2001), *infra*, and *Apprendi*, *supra*, the Court noted that "the location of the crime is relevant only to the sentence the defendant may receive and not to whether, in fact, the defendant committed the offense distributing a controlled substance as charged in the indictment. In *Poole*, the Court held it is not necessary to include enhancements under § 13A-12-250 and 13A-12-270 in the indictment, therefore, amending the indictment to include these enhancements was held to amount to mere surplusage. *Conner v. State*, 899 So.2d 295 (Ala. Crim. App. 6/28/2002), On Return to Remand.

## **Split Sentencing Statute**

### **Court Exceeded Jurisdiction in Splitting Aggregate Sentence Exceeding 20 Years**

A court must consider enhancements pursuant to § 13A-12-250 and 13A-12-270, Ala.Code, 1975, as part of a single aggregate sentence for an offense. A circuit court does not have jurisdiction to split a 25 year sentence.

*Draper v. State*, 945 So.2d 1096 (Ala.Crim.App. 2005).

### **Split Sentence After Revocation of Probation Portion of Original Split Authorized**

A trial court has authority to split sentences upon revocation of probation by adding another period of confinement and suspending remaining portion, overruling *Hollis v. State*, 845 So.2d 5 (Ala.Crim. App. 2002. In *Dixon v. State*, 912 So.2d 292(Ala.Crim.App. 1/28 05) the Court of Criminal Appeals held:

“§15-18-8(c), Ala.Code 1975, ... merely authorizes a circuit court to suspend any portion of the period of confinement, to modify the conditions of probation, and to revoke probation even if the defendant had not begun serving his period of confinement or if the defendant is currently serving his period of confinement. Section 15-18-8(c), Ala.Code 1975, does not address the alternatives available to a circuit court when it finds that a defendant has violated the terms and conditions of his probation and does not address the circuit court’s jurisdiction over a defendant who has served the period of confinement. Rather,,... §15-22-54(d), Ala.Code 1975, provides for the initiation of revocation proceedings against a defendant who is on probation and sets forth the alternatives available to a circuit court when it finds that a defendant has violated the terms and conditions of his probation.”

...

“[I]n *Hollis*, this court held that when a circuit court finds that a defendant has violated the terms and conditions of his probation, that court may only reinstate the suspended portion of the original term of confinement. However, this holding ignores the remaining language of § 15-22-54(d), Ala.Code 1975, which provides, in pertinent part:

“(1) If the defendant violates a condition of probation or suspension of execution of sentence, the court, after a hearing, may implement one or more of the following options:

- a. Continue the existing probation or suspension of execution of sentence.
- b. Issue a formal or informal warning to the probationer that further violations may result in revocation of probation or suspension of execution of sentence.
- c. Conduct a formal or informal conference with the probationer to reemphasize the necessity of compliance with the conditions of probation.

## Split Sentencing Statute

- d. Modify the conditions of probation or suspension of execution of sentence, which conditions *may include the addition of short periods of confinement*.
- e. Revoke the probation or suspension of execution of sentence..

“2. If the court revokes probation,, it may, after a hearing, impose the sentence that was suspended at the original hearing or any lesser sentence, including any option listed in subdivision (1)’ (Emphasis added)”

...

A reading of ...§15-22-54, makes it clear that the trial court did have the authority to ‘split’ the appellant’s original sentence on revocation of probation... Construed in the context, the sentence ‘[t]he total time spent in confinement may not exceed the term of confinement of the original sentence,’ clearly refers to the total time a defendant has spent in confinement ---whether it be in full-time confinement in facilities such as county jail, state prison, and boot camp, or any ‘partial’ confinement such as work release programs, intermittent confinement, and home detention.... And that such total time of confinement may not exceed the term of the defendant’s original sentence. In other words, the length of a defendant’s sentence ... may not be increased after his probation is revoked.”

*Dixon v. State*, 912 So.2d 292(Ala.Crim.App. 1/28/05); cited with approval in *Gray v. State*, 939 So.2d 962 (Ala.Crim.App. 2006).

## No Right to Reject Split of Split

In *Dixon v. State*, 912 So.2d 292 (Ala.Crim.App. 2005), the Court of Criminal Appeals held that a defendant does not have the right to reject a split sentence imposed after revocation of probation. *Gray v. State*, 939 So.2d 962 (Ala.Crim.App. 2006).

## 3 Year Mandatory Minimum Imprisonment Can Be Suspended

While the split sentencing statute requires that a defendant’s sentence to greater than 15 years but not more than 20 years include a minimum term of imprisonment of no less than 3 years nor more than 5 years, a sentencing court can suspend the 3 year mandatory minimum term of confinement under § 15-18-8(a)(1). Subsection (c) of the split sentencing statute expressly authorizes a trial court to suspend the minimum sentence required under subsection (a, including the minimum period of confinement for sentences greater than 15 years but not more than 20 years. The court may suspend the entire sentence.

*Ex parte McCormick*, 932 So.2d 124 (Ala. 2005).

## **Split Sentencing Statute**

### **Probation Essential Part of Split**

Pursuant to the language of the split sentencing statute a trial court can split a sentence only if the defendant is placed on probation for a definite period following the confinement portion of the split sentence.

*English v. State*, 954 So.2d 1136 (Ala.Crim.App. 2006).

### **Probation Must Follow Confinement – Manner In Which Sentence Executed Invalid**

In this case the Rule 32 petitioner was challenging the trial court's jurisdiction in sentencing him to 15 years imprisonment, split to serve six months in confinement. The record in the case failed to indicate whether the sentence included a probationary term to follow the six-month term of confinement. Citing the split sentence, the Court of Criminal Appeals held that "[t]he plain language of the statute indicates that a trial court can split a sentence only if the defendant is placed on probation for a definite period following the confinement portion of the split sentence." Remanding the case to the trial court for clarification, the Court held that if the original sentence did not include a probationary term to follow the confinement portion of the sentence, execution of the sentence was invalid under § 15-18-8, the split sentence statute. *Madden v. State*, 864 So.2d 395 (Ala.Crim.App. 2002). See also, *Moore v. State*, 871 So.2d 106 (Ala.Crim.App. 2003), recognizing that § 15-18-8 requires suspension of that portion of the split that is not actual confinement and placement of the defendant on probation. Citing *Madden* and other cases, the Court reiterated that the trial court's power to suspend, which derives from Amendment 38 of the Alabama Constitution, can only be exercised when coupled with an order of probation.

### **Probation is essential part of Split Sentence**

In *Hemrick v. State*, 922 So.2d 967 (Ala.Crim.App.2005), the Alabama Court of Criminal Appeals held:

"The plain language of § 15-18-8, Ala. Code 1975,] indicates that a trial court can split a sentence only if the defendant is placed on probation for a definite period following the confinement portion of the split sentence. Indeed, this Court has recognized that '[a]pplication of § 15-18-8 necessitates suspension of that portion of the split sentence that is not actual confinement and placement of the convicted defendant on probation. ...' *Hughes v. State*, 518 So.2d 890, 891 (Ala.Crim.App. 1987). In addition, 'in view of the history and text of Amendment 38 [of the Alabama Constitution of 1901, from which a trial court's power to suspend a sentence stems,] the power to suspend a sentence ... can only be exercised when coupled with an order for probation.' *Holman v. State*, 43 Ala.App. 509, 513, 193 So.2d 770, 773.(1966) (emphasis added." *Madden v. State*, 864 So.2d 395, 398 (Ala.Crim.App. 2002."

*Hemrick v. State*, 922 So.2d 967 (Ala.Crim.App.2005); *Hughes v. State*, 518 So.2d 890 (Ala.Crim.App. 1987).

## **Split Sentencing Statute**

### **Appeal – Boot Camp/Split Sentence**

An order dismissing a defendant from “boot camp” and ordering him to serve his period of confinement in prison is a modification of the defendant’s place of confinement rather than probation revocation, and is therefore, not an appealable order.

*Romanick v State*, 816 So. 2d 1081 (Ala.Crim.App. 2001).

### **Modifying Consecutive Sentences To Concurrent**

Although Rule 12.12(c) of the Alabama Rules of Criminal Procedure allows a trial court to “at any time by a nunc pro tunc order provide that previously imposed consecutive sentences run concurrently” it does not authorize the trial court to amend a sentence order to change a concurrent sentence to a consecutive sentence.”

### **Revocation of Probation on Split – Total Period of Confinement**

Upon revocation of probation of a split sentence, a trial court may impose additional periods of confinement on a defendant so long as the total period of confinement does not exceed the maximum (3 or 5 years) provided in the split sentencing statute.

*Phillips v. State*, 932 So.2d 165; *Moore v. State*, 814 So.2d 308 (Ala.Crim.App. 2001). See also, *Smitherman v. State*, 2006 WL 2788978 (Ala.Crim.App. 9/29/06).

### **Modifying Sentence To Increase Sentence Prohibited**

“Once a valid sentence has been entered, it cannot, in the absence of fraud or another compelling reason be altered anytime thereafter so as to increase the severity of the sentence.”

*Shivener v. State*, 2006 WL 2457526 (Ala.Crim.App. 2006); *Ex parte Tice*, 475 So.2d 590, 591-02 (Ala.1984).

### **Three Mile Radius Enhancements**

#### **Sale of Drugs – 3 Mile Radius Enhancement Applies to Agent for Seller But Not Agent for Buyer**

A conviction for unlawful distribution of controlled substances is subject to enhancement under the 3-mile radius statutes (§13A-12-250 and 13A-12-270) only if the defendant's activity constituted a sale, and not if the defendant acted as the agent of the buyer. *Ex parte Mutrie*, 658 So.2d 347 (Ala. 1993).

The exception carved out in *Mutrie* applies only to someone who acts as an agent for the buyer. An agent for the seller does not come under the *Mutrie* exception. *Pierson v. State*, 677 So.2d 242 (Ala.Crim.App. 1995), reversed on other grounds, *Ex parte Pierson*, 677 So.2d 246 (Ala. 1995).

#### **Applicable to Attempts and Conspiracy to sell Controlled Substances**

Sentence enhancements for selling drugs within three miles of a school and public housing project apply to convictions for the conspiracy to sell a controlled substance and the attempt to sell a controlled substance.

*Skinner v. State*, 843 So.2d 820 (Ala.Crim.App. 2002), overruling *Williams v. State*, 665 So.2d 955 (Ala.Crim.App. 1994).

#### **Need Not Be Alleged in Indictment**

#### **Demand Reduction Assessment Act – Provisions Mandatory**

Reversing the holding Court of Criminal Appeals, the Alabama Supreme Court held that the provisions of the Demand Reduction Assessment Act (13A-12-281) imposing a \$1,000 fine for first time offenders and a \$2,000 fine for second and subsequent offenders, are mandatory. The assessment is applicable to any person convicted or adjudicated delinquent of the following crimes: Trafficking in illegal drugs (13A-12-231); Sale, furnishing, etc. of controlled substance by persons over the age of 18 to person under age 18 (13A-12-215); possession of marijuana 1<sup>st</sup> (13A-12-213); distribution of a controlled substance (13A-12-211); receipt of a controlled substance (§13A-12-212); attempt, conspiracy or criminal solicitation to commit a controlled substance crime (§13A-12-203, 13A-12-204 and 13A-12-202).

*Ex parte Pierson*, 677 So.2d 246 (Ala. 1995).

**Note:** Unlawful manufacture of controlled substance, §§13A-12-218 and 217, and unlawful possession of anhydrous ammonia, §13A-12-219, are not listed as offenses for which the mandatory assessment is applicable.

The Supreme Court's decision in *Apprendi* [*v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (S.Ct. 2000)] does not require that Alabama's 5-year sentence enhancements for selling drugs within a three-mile radius of a school or housing project enhancements (§§ 13A-12-250 and 13A-12-270) be alleged in the indictment.

*Austin v. State*, 864 So.2d 1115 (Ala.Crim.App. 2003); *Poole v. State*, 846 So.2d 370 (Ala.Crim.App. 2001).

### **Three Mile Radius Enhancements**

#### **Applicable to Conspiracies and Attempts**

Sections 13A-12-250 and 13A-12-270 are applicable to convictions for the conspiracy to *sell* a controlled substance and the attempt to sell a controlled substance. *Skinner v. State*, 843 So.2d 820 (Ala.Crim.App. 2002).

#### **Not Applicable to Distribution Other Than Sales**

The three-mile enhancement provisions of §§ 13A-12-250 and –270, prescribe a five-year sentence enhancement for persons convicted of an unlawful sale of a controlled substance within three miles of a school and within three miles of a housing project. These statutes apply only to convictions involving sales and *not* to convictions involving furnishing, giving away, manufacturing, delivering or distributing a controlled substance in violation of § 13A-12-211. The enhancements would not apply to convictions for conspiracy or attempt where the underlying controlled substance is not a sale. *Skinner v. State*, 843 So.2d 820 (Ala.Crim.App. 2002). See *Williams v. State*, (overruled on other grounds). 706 So.2d 82 (Ala.Crim.App. 1997), holding that unless the defendant sold or is found to have collaborated or associated with the seller to sell a controlled substance, the enhancements do not apply

#### **Guilty Plea – Notice of Enhancements**

Unless a defendant is advised by the trial court or counsel that the enhancement provisions of §§ 13A-12-250 and 13A-12-270 would be applied to his sentence and that he could not receive probation, he has not been informed of the true and correct terms of the sentence and his guilty plea cannot be said to be knowingly given. *Smith v. State*, 852 So.2d 185 (Ala.Crim.App. 2002); *Ragland v. State*, 883 So.2d 730 (Ala.Crim.App. 2003).

### **Firearm Enhancement Statute**

The Firearm enhancement statute can be applied to a conspiracy conviction.

*Browder v. State*, 728 So.2d 1108 (Ala. 1007), on remand, 728 So.2d 1113 (Ala.Crim.App. 1998).

Whether the defendant possessed the requisite culpability for the firearm enhancement statute to apply must be determined on a case-by-case basis.

*Woods v. State*, 602 So.2d 1210, 1211 (Ala.Crim.App. 1992).

The firearm sentence enhancement provision of 13A-5-6 (5), *Code of Alabama* 1975, can apply, under the facts of the case to a reckless manslaughter conviction.

*Mays v. State*, 607 so.2d 347 (Ala.Crim.App. 1992).

## **Firearm Enhancement Statute**

The firearm enhancement statute can be applied to enhance a sentence for conspiring to distribute a controlled substance and can be applied to a coconspirator where one defendant possesses a firearm during the conspiracy. (overruled on other grounds).

*Browder v. State*, 728 So.2d 1108 (Ala.1997), on remand, 728 So.2d 1113 (Ala.Crim.App.1998)

## **Drug Trafficking Firearm Enhancement Fine**

Imposition of \$25,000 fine in connection with statutory firearm possession enhancement [ § 13A-12-231 (13)] is mandatory and a defendant subject to the fine must be informed of the fine prior to entry of a guilty plea.

*Carter v. State*, 812 So.2d 391 (Ala.Crim.App. 2001); *Calloway v. State*, 860 So.2d 900 (Ala.Crim.App. 2002).

## **Demand Reduction Assessment Act**

### **Provisions Mandatory**

Reversing the holding Court of Criminal Appeals, the Alabama Supreme Court held that the provisions of the Demand Reduction Assessment Act (13A-12-281) imposing a \$1,000 fine for first time offenders and a \$2,000 fine for second and subsequent offenders, are mandatory. The assessment is applicable to any person convicted of the following crimes: Trafficking in illegal drugs (13A-12-231); Sale, furnishing, etc. of controlled substance by persons over the age of 18 to person under age 18 (13A-12-215); possession of marijuana 1<sup>st</sup> (13A-12-213); distribution of a controlled substance (13A-12-211); receipt of a controlled substance (§13A-12-212); attempt, conspiracy or criminal solicitation to commit a controlled substance crime (§13A-12-203, 13A-12-204 and 13A-12-202). *Ex parte Pierson*, 677 So.2d 246 (Ala. 1995).

**Note:** Unlawful manufacture of controlled substance, §§13A-12-218 and 217, and unlawful possession of anhydrous ammonia, §13A-12-219, are not listed as offenses for which the mandatory assessment is applicable.

### **Not applicable to Unlawful Manufacture of Controlled Substances**

The Demand Reduction Assessment Act (§13A-12-281, Ala.Code 1975) authorizing the imposition of \$1000 fine for particular offenses does not apply to convictions for the offense of first degree unlawful manufacture of controlled substances. *O'Callaghan v. State*, 945 So.2d 467 (Ala.Crim.App. 2006). Juvenile adjudications were exempted by Act 2006-560.



## **YOUTHFUL OFFENDER ADJUDICATION**

### **Deferred Adjudication and Dismissal Beyond Trial Court's Authority – Trial Court Fashioned own Pre-Trial Diversion Program**

After granting the Defendant Youthful Offender Status and accepting her guilty plea for possession of a controlled substance, the trial court deferred adjudication for one year and placed the youth on “court-supervised probation” for a year, to later dismiss the charge if the defendant did “[n]ot get into any trouble for one year.” After reviewing the alternative sentencing provisions of the Youthful Offender Act (§15-19-6), the Court of Criminal Appeals held that in withholding adjudication and dismissing the case, the trial court exceeded the authority granted by the Youthful Offender Act and that it usurped the authority of the executive branch in conducting an unsanctioned diversionary program. The case was reversed and remanded to the trial court with instructions to reinstate the charge.

*Ex parte D.L.A.*, 2007 WL 1965443 (Ala.Crim.App. 6/29/07)

### **Grant of Status**

“[T]he seriousness of the charge *alone* is not sufficient basis on which to deny YO status, but the nature of the facts on which the charge rests may alone be sufficient to deny YO status.”

In determining whether to grant a defendant youthful offender status, the trial court is expected to consider the nature of the crime charged, along with prior convictions of the defendant and any other matter it deems relevant.

*Flowers v. State*, 922 So.2d 938 (Ala.Crim.App. 2005).

### **Consecutive Probationary Sentences**

Imposition of consecutive probationary sentences by the trial court was held to contravene the Youthful Offender Act where the term of probation would exceed the three year probationary limit.

*Ex parte Jackson*, 415 So.2d 1169 (Ala. 1982)

## **Excerpts From Mr. Schweitzer's Publication Distributed to States' Attorney Generals**

### **HIGHLIGHTS OF THE 2006 SUPREME COURT TERM**

During its 2006 Term, the Supreme Court resolved many important issues to the states. . On the criminal law side, the Court ruled that its holding in *Crawford v. Washington* does not apply retroactively to cases on collateral review. State Attorney General Offices were active before the Court, serving as counsel in 20 of the 71 cases argued this Term.

Below is a brief summary of (selected) decisions issued by the Court in its 2006 Term, categorized by subject matter.

Dan Schweitzer  
Supreme Court

Counsel

June 29, 2007

### **OPINIONS ISSUED IN THE 2006 TERM**

#### Criminal Law and Procedure

1. *United States v. Resendiz-Ponce*, 05-998. By an 8-1 vote, the Court held that the Ninth Circuit erred when it ruled that respondent's indictment for illegally attempting to reenter the United States was defective because it did not allege a specific overt act that he committed in seeking reentry. The Court concluded that the indictment implicitly alleged that respondent engaged in the necessary overt act simply by alleging that he "attempted to enter the United States." The Court therefore did not reach the question on which it had granted certiorari, namely, whether the omission of an element of an offense from a federal indictment can constitute harmless error.

2. *Cunningham v. California*, 05-6551. By a 6-3 vote, the Court held that California's sentencing regime — which imposes three specific terms of punishment for most offenses, but authorizes a judge to impose the upper term only when the judge finds one or more additional "circumstances in aggravation" — violates a defendant's right to a jury trial as explicated in *Apprendi v. New Jersey* and *Blakely v. Washington*. The Court concluded that the California Supreme Court's description of this judicial fact-finding as a reasonableness constraint did not save the statute; "[t]he reasonableness requirement [*United States v.*] *Booker* anticipated for the federal system operates *within* the Sixth Amendment constraints delineated in our precedents, not as a substitute for those constraints."

3. *James v. United States*, 05-9264. By a 5-4 vote, the Court held that all convictions in Florida for attempted burglary qualify as “violent felon[ies]” under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), which imposes a mandatory minimum 15-year sentence on any person who possesses a firearm after having been convicted on three previous occasions of a “violent felony.” ACCA defines a “violent felony” to include a crime that “is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” The Court concluded that attempted burglary falls within the residual “serious potential risk of physical injury” provision.

4. *Scott v. Harris*, 05-1631. By an 8-1 vote, the Court held that a law enforcement officer (Scott) did not violate the Fourth Amendment when, to terminate a high-speed chase, he bumped the fleeing suspect’s vehicle, thereby causing that vehicle to crash. Applying the “objective reasonableness” standard of *Graham v. Connor*, 490 U.S. 386, 388 (1990), the Court found that the fleeing suspect “posed an actual and imminent threat to the lives of” pedestrians, motorists, and officers involved in the chase, which justified Scott’s taking action that posed a high likelihood of serious injury or death to the suspect.

5. *Los Angeles County v. Rettele*, 06-605. By a 6-3 vote, the Court summarily reversed a Ninth Circuit ruling that two deputy sheriffs violated the Fourth Amendment when they searched a house, found in a bedroom two residents who were of a different race than the suspects named in the search warrant, ordered the two residents out of bed, and required them to stand naked for a few minutes before allowing them to dress. In reversing, the Court reasoned that the “presence of some Caucasians in the residence did not eliminate the possibility that the suspects lived there as well,” and that the deputy sheriffs’ orders “were permissible, and perhaps necessary, to protect the[ir] safety” given that “[b]lankets and bedding can conceal a weapon.”

6. *Brendlin v. California*, 06-8120. The Court unanimously held that a passenger in a car that is pulled over for a traffic stop is seized within the meaning of the Fourth Amendment, and therefore has the right to challenge the constitutionality of the stop. The Court concluded that when the car stopped “any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.”

7. *Rita v. United States*, 06-5754. By an 8-1 vote, the Court held that a federal court of appeals may apply a non-binding presumption of reasonableness to a district court sentence that is within the standard Federal Sentencing Guidelines range. The Court reasoned that the Guidelines “seek to embody the [18 U.S.C.] § 3553(a) considerations,” and “[a]n individual judge who imposes a sentence within the range recommended by the Guidelines thus makes a decision that is fully consistent with the Commission’s judgment in general.”

## Capital Punishment/Habeas Corpus

1. *Ayers v. Belmontes*, 05-493. By a 5-4 vote, the Court held that California's "catch-all" mitigation instruction in capital cases — which directs juries to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" — instructed jurors to consider respondent's background and character evidence offered to show that he would adjust well to life in prison. The Court therefore reversed a Ninth Circuit decision holding that the instruction did not do so and therefore violated respondent's right to have his mitigating evidence considered by the jury. The Court relied on its earlier decision in *Boyde v. California*, 494 U.S. 370 (1990), which held that the "catch-all" instruction directed jurors to consider mitigating factors unrelated to the crime itself, such as the defendant's background and character.

2. *Carey v. Musladin*, 05-785. The Court held that the Ninth Circuit erred when it granted habeas relief to a defendant convicted of murder because members of the victim's family sitting in the spectator's gallery wore buttons depicting the victim. The Court stated that it "has never addressed a claim that . . . private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial," and that it therefore "cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law'" when it upheld the conviction.

3. *Burton v. Stewart*, 05-9222. Through a *per curiam* opinion, the Court unanimously held that the Ninth Circuit lacked jurisdiction over Burton's habeas petition because it was a second or successive petition yet he failed to comply with the gatekeeping requirements of 28 U.S.C. § 2244(b). The Court therefore declined to reach the question on which it had granted certiorari, namely, whether *Blakely v. Washington*, 542 U.S. 296 (2004), announced a new rule of law that does not apply retroactively on collateral review.

4. *Lawrence v. Florida*, 05-8820. By a 5-4 vote, the Court held that the one-year statute of limitations for filing a federal habeas corpus petition is not tolled during the pendency of a certiorari petition filed with the U.S. Supreme Court seeking review of the denial of state post-conviction relief. Under 28 U.S.C. § 2244(d)(2), the limitations period is tolled while an "application for State post-conviction or other collateral review" "is pending." The Court concluded that, naturally read, § 2244(d)(2) only applies to the period of time when "state courts review the application." The Court also rejected petitioner's equitable tolling claim.

5. *Whorton v. Bockting*, 05-595. The Court unanimously held that its decision in *Crawford v. Washington*, 541 U.S. 36 (2004), does not apply retroactively to cases on collateral review. In *Crawford*, the Court overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), and held that "[t]estimonial statements of witnesses absent from trial" are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness]." Applying the doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), the Court here held that *Crawford* announced a new rule of criminal procedure, but not one that can properly be characterized as a "watershed" rule.

6. *Smith v. Texas*, 05-11304. By a 5-4 vote, the Court held that the Texas Court of Criminal Appeals erred when it upheld the capital sentence imposed on petitioner based on its application of a heightened harmless error standard. In *Smith v. Texas*, 543 U.S. 37 (2004) (*per curiam*), the Court held that the jury instructions in petitioner's capital sentencing proceeding suffered the same infirmity as the jury instructions in *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*) — namely, they failed to give the jury a vehicle through which to give effect to certain mitigating evidence he presented. On remand, the Texas Court of Criminal Appeals declined to overturn petitioner's death sentence, holding that (1) he failed to make a timely objection to the instructions at trial, and (2) he failed to show that the error in his instructions resulted in "egregious harm," the standard of review under Texas law for errors raised for the first time on appeal. In reversing, the Supreme Court held that the state court erred in concluding that petitioner failed to preserve his *Penry II* claim, and that "it appears [petitioner] is entitled to relief under" regular state harmless-error review, given that *Penry II* error requires "a reasonable likelihood that the jury believed that it was not permitted to consider" some mitigating evidence.

7. *Abdul-Kabir v. Quarterman*, 05-11284. By a 5-4 vote, the Court held that the Fifth Circuit erred when it declined to grant petitioner habeas relief with respect to his death sentence based on his claim of *Penry I* error. The Court concluded that *Penry I* — *Penry v. Lynaugh*, 492 U.S. 302 (1989) — established that Texas' special verdict questions were inadequate because they failed to provide the jury with a vehicle to express "its reasoned moral response" to mitigating evidence of mental retardation. The Court found it "clearly established" that this problem equally applied in petitioner's case: "Like *Penry*'s evidence, [Abdul-Kabir]'s evidence of childhood deprivation and lack of self-control did not rebut either deliberateness or future dangerousness [the issues posed by the special verdict questions] but was intended to provide the jury with an entirely different reason for not imposing a death sentence." The Court rejected the dissent's contention that two of its decisions after *Penry I*, which held that the Texas special verdict questions *did* give effect to evidence of youth and transient upbringing, made the law anything but "clearly established."

8. *Brewer v. Quarterman*, 05-11287. By the same 5-4 vote as in *Abdul-Kabir*, the Court held that the Fifth Circuit likewise erred in not granting petitioner Brewer habeas relief under *Penry I*. The Court found that even "[u]nder the narrowest possible reading" of *Penry I*, Texas' special issues failed to allow for consideration of Brewer's claims of mental illness, extensive childhood abuse by his father, and substance abuse.

9. *Schriro v. Landrigan*, 05-1575. By a 5-4 vote, the Court held that the *en banc* Ninth Circuit erred when it held that the district court should have granted an evidentiary hearing to a capital defendant (Landrigan) who sought to assert that his counsel provided ineffective assistance at the sentencing proceeding. In reversing the Ninth Circuit, the Court found that (1) the state courts' findings that Landrigan instructed his counsel not to present any evidence at the sentencing proceeding was not an unreasonable determination of the facts under 28 U.S.C. §2254(d)(2); (2) it was not objectively unreasonable for the state postconviction court "to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence"; (3) there was no

basis for the Ninth Circuit to conclude that Landrigan's waiver was not "informed and knowing"; and (4) the federal district court did not abuse its discretion when it concluded that "Landrigan could not establish prejudice based on his counsel's failure to present the evidence he now wishes to offer."

10. *Uttecht v. Brown*, 06-413. By a 5-4 vote, the Court reversed a Ninth Circuit ruling that had overturned a death sentence on habeas review on the ground that the state trial judge erred in removing a juror based on the juror's apparent unwillingness to impose the death penalty. The Court ruled that the "trial court acted well within its discretion in granting the State's motion to excuse" a juror who made statements suggesting he could not impose the death penalty because there was no possibility of release. The Court placed great weight on defense counsel's failure to object to the prosecution's challenge, which "deprived reviewing courts of further factual findings that would have helped to explain the trial court's decision."

11. *Panetti v. Quarterman*, 06-6407. By a 5-4 vote, the Court held that the Fifth Circuit employed too restrictive a standard when it held that a prisoner is competent to be executed so long as he is aware that he committed the murders, that he will be executed, and that the reason the state has given for his execution is his commission of those murders — even if a mental illness has made him delusionally believe that the *real* reason the state is executing him is to stop him from preaching. In reversing, the Court held that the Fifth Circuit standard demeans the relevance of the prisoner's delusions. The Court did not, however, "attempt to set down a rule governing all competency determinations," concluding instead that the lower courts should develop a better record regarding petitioner's alleged mental problems. In the course of this ruling, the Court also held that (1) petitioner's habeas petition asserting his incompetence to be executed was not a "second or successive" application for purposes of applying 28 U.S.C. §2244(b), and (2) the state court's procedures for assessing his claim were objectively unreasonable within the meaning of 28 U.S.C. §2254(d)(1) because the court violated state procedures and did not hold a hearing or provide petitioner with an adequate opportunity to provide his own expert evidence.

## **CASES TO BE ARGUED IN THE 2007 TERM**

[AGO cases in bold]

### Criminal Law

1. *Logan v. United States*, 06-6911. At issue is whether a state misdemeanor conviction that did not result in a deprivation of civil rights can be a predicate offense under the Armed Career Criminal Act, 18 U.S.C. §924(e)(1), which enhances the penalty imposed on felons for possessing a firearm where the felon had at least three prior convictions for violent crimes or serious drug offenses.

2. *Watson v. United States*, 06-571. Title 18 U.S.C. §924(c)(1) imposes a 5-year minimum term of imprisonment upon a person who "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm." The question

presented is whether the mere receipt of an unloaded firearm as payment for drugs constitutes “use” of a firearm for purposes of that provision.

3. *United States v. Santos*, 06-1005. The principal federal money laundering statute, 18 U.S.C. §1956(a)(1), makes it a crime to engage in a financial transaction using the “proceeds” of certain specified unlawful activities with the intent to promote those activities or to conceal the proceeds. The question presented is whether “proceeds” means the gross receipts from the unlawful activities or only the profits, *i.e.*, gross receipts less expenses. The Seventh Circuit, in the decision under review, adopted the latter interpretation.

4. *Medellin v. Texas*, 06-984. In the *Case Concerning Avena & Other Mexican Nationals*, 2004 I.C.J. 128 (March 31) (“*Avena*”), the International Court of Justice ruled that, to remedy violations of the Vienna Convention, 51 named Mexican nationals — including petitioner Medellin — were entitled to receive review and reconsideration of their convictions and sentences through the judicial process of the United States. President George W. Bush later issued a “Memorandum for the Attorney General” stating that he has determined the United States would comply with the *Avena* decision “by having State courts give effect to the decision in accordance with general principles of comity.” At issue in this case are (1) whether the President exceeded his authority when he issued the Memorandum; (2) whether the Memorandum constitutes binding federal law that abrogates otherwise applicable state-law procedural bars to reviewing Medellin’s conviction and sentence at this time; and (3) whether, even absent the President’s determination, a private party could enforce the *Avena* decision in state court.

5. *Gall v. United States*, 06-7949. At issue is whether, under *United States v. Booker*, 543 U.S. 220 (2005), it is unreasonable for a federal district court to choose a sentence below the federal Sentencing Guidelines range absent special circumstances.

6. *Kimbrough v. United States*, 06-6330. At issue is whether, under *United States v. Booker*, 543 U.S. 220 (2005), a federal district court has the authority to impose a sentence below the Guidelines range in order to counteract the Guidelines’ more severe treatment of crack as compared to powder cocaine offenses. (The Guidelines punish crack cocaine offenses 100 times more severely than powder cocaine offenses.)

7. *Snyder v. Louisiana*, 06-10119. The principal issue in this capital case is whether the prosecutors violated *Batson v. Kentucky*, 476 U.S. 79 (1986), when they removed all five prospective African-American jurors through peremptory challenges. Petitioner argues that the Louisiana Supreme Court failed to consider “the prosecutor’s repeated comparisons of this case to the O.J. Simpson case, . . . the prosecutor’s disparate questioning of white and black prospective jurors, and documented evidence of a pattern of practice by the prosecutor’s office to dilute minority presence in petit juries.”

# **SENTENCING STANDARDS**





### **XIII. ALABAMA SENTENCING STANDARDS**

#### **A. General Instructions**

##### **1. Introduction**

##### **The Voluntary Sentencing Standards and Worksheets – A Structured Sentencing System**

The Voluntary Sentencing Standards are:

- ☐ Voluntary and non-appealable;
- ☐ Developed by judges, prosecutors, defense lawyers, victim advocates, and other criminal justice officials in response to the legislative directive to recommend a more structured sentencing system in Alabama to address unwarranted disparity and prison overcrowding (reserving scarce prison resources for the most dangerous and violent offenders); § 12-25-2, Code of Alabama 1975.
- ☐ Created from historical sentencing data, reflecting the major factors considered in making sentencing decisions and the importance of those factors to each other;
- ☐ Include the historical application of Alabama’s statutory sentence enhancements and mandatory minimums, except the sentences of life without parole and the new child sexual offender laws;
- ☐ Designed to mimic the two decisions in criminal sentencing – where and how the sentence is served, prison or non-prison (disposition), and the length of the sentence (duration).
- ☐ Expected to be followed in 75% of the covered cases, leaving flexibility with judges to sentence higher or lower as appropriate in approximately 25% of the covered cases; and
- ☐ Designed to shorten sentence length recommendations for in non-violent cases to alleviate overcrowding and to make room for violent offenders.

In addition, the Standards and Worksheets

- o Cover the 26 most frequently sentenced offenses and 87% of sentenced cases;
- o Standardize sentence recommendations for more informed and uniform sentencing practices and the elimination of unwarranted disparity;
- o Allow judges to retain discretion in arriving at sentencing decisions;

- o Encourage the use of probation and community correction programs for non-violent offenders;
- o Make all mandatory minimums and sentence enhancements (except life without parole, and the child sex offender amendments) discretionary; and
- o Address overcrowding by providing a mechanism for changing sentence recommendations to meet economic reality while preserving public safety.

The Voluntary Sentencing Standards consist of three sets of worksheets and prison sentence length tables that divide the covered offenses into three offense types designated property, drug, and personal offenses.

The property, drug, and personal offense types each contain an In/Out worksheet that recommends a sentence disposition and a Prison Sentence Length worksheet that recommends a sentence length range.

Each type of worksheet relies on a sentence length table from which a sentence range is recommended based on Prison Sentence Length Worksheet score.

## **2. Administrative Procedures**

### **§ 12-25-35**

#### **Responsibility for Completing Worksheets**

The worksheets may be completed by a probation officer, the prosecutor, or any other person designated by the sentencing judge. § 12-25-35 (a) This responsibility may be divided; for example, the judge may designate one person to complete the case information and the sentencing factors information and to total the scores for determining the sentencing worksheet recommendations prior to sentencing and another person to complete the actual sentence information before the form is forwarded by the clerk to the sentencing commission. *How this is done is up to the sentencing judge who has the final responsibility for seeing that the forms are completed, considered by the court, and sent to the Court Clerk for forwarding to the Alabama Sentencing Commission.*

#### **Responsibilities of Worksheet Preparer**

The Worksheet Preparer(s) obtains the necessary information needed to complete the worksheet; totals the scores; and determines the recommended sentence based on the worksheet scores, distributes the worksheets to the appropriate parties, and presents the completed recommendation to the sentencing judge.

## **Worksheet Distribution**

A copy of the sentencing worksheets reflecting the sentencing recommendations must be presented to the prosecutor, the defendant and/or his attorney, and the sentencing judge prior to sentencing. § 12-25-35 (d)

The final worksheets showing not only the recommendations, but also the actual sentence and disposition of the sentence, must be given to the Court Clerk to forward to the Alabama Sentencing Commission.

## **Use of the Worksheets by the Sentencing Judge**

Prior to sentencing, the trial court shall review the sentencing standards worksheets and consider the suitability of the applicable voluntary sentencing recommendations. In imposing sentence, the court shall indicate on the record that the worksheets and applicable sentencing standards have been reviewed and considered. § 12-25-35 (b)

After sentencing, the sentencing judge shall give the completed worksheets showing sentence recommendations, the actual sentence, and if applicable, the reasons for departure, to the Court Clerk to forward to the Alabama Sentencing Commission.  
§ 12-25-35 (e)

## **Departure from the Worksheet Recommendations**

The worksheets are designed with the expectation they will provide appropriate recommendations in at least 75% of the covered cases. The sentencing judge may choose to sentence any covered case outside the standards in accordance with existing law.

When the trial court imposes a sentence that departs from the voluntary standards, the Alabama Sentencing Commission requests that the court provide a brief written reason for the departure. This information will be used by the Commission in evaluating the standards and determining where changes should be made. Providing this information gives each sentencing judge an opportunity to have input into future changes to the standards.  
§ 12-25-35 (c).

Neither the departure nor the reason stated for the departure shall be subject to appellate review, but is to be provided to the Alabama Sentencing Commission for future consideration concerning modification of the voluntary sentencing standards and for statistical purposes only. § 12-25-35 (c).

## **Responsibilities of the Court Clerk**

Following the imposition of a sentence in a felony case, the clerk of the court in which the case was disposed shall forward a copy of the sentencing order or orders, a copy of the voluntary sentencing standards worksheets prepared in the case, and a copy of any departure explanation to the commission within 45 days after the imposition of sentence.  
§ 12-25-35 (e).

These documents may be sent in paper form or electronically. Paper forms must be sent to:

Alabama Sentencing Commission  
300 Dexter Avenue  
Montgomery, AL 36104

The Court Clerk should ensure that the actual sentence recorded on the worksheets is the same as reflected on the case action summary.

### **Appellate Review**

Failure to follow the standards, or failure to follow any or all of the standards in the prescribed manner, shall not be reviewable on appeal or serve as the basis of any other post-conviction relief. § 12-25-35 (f)

### **Judicial Disagreement with Worksheet Scoring and Instructions**

To comply with the sentencing standards, the sentence imposed must be imposed according to the Instructions in this manual. Any sentence imposed outside the standards must be in accordance with existing law, exclusive of the standards. If a judge disagrees with the standards recommendation or weighting of factors and chooses to disregard the recommendation or the weighting of any factor as set out in the worksheets or worksheet instructions, the only option is to sentence under existing law exclusive of the standards recommendation. The judge's disagreement may be properly expressed by stating the disagreement as a reason for departure on the worksheets.

### **3. Completing the Worksheets**

#### **When to use the Voluntary Sentencing Standards**

##### **Covered Offenses**

The following offenses are covered by the Voluntary Sentencing Standards and Worksheets.

<b>Personal Worksheets</b>	<b>Property Worksheets</b>	<b>Drug Worksheets</b>
Assault I § 13A-6-20	Burglary I § 13A-7-5	Felony DUI § 32-5a-191(h)
Assault II § 13A-6-21	Burglary II § 13A-7-6	Possession of Marihuana I § 13A-12-213
Manslaughter § 13A-6-3	Burglary III § 13A-7-7	Unlawful Possession of a Controlled Substance § 13A-12-212
Murder § 13A-6-2	Forgery II § 13A-9-3	Sale/Distribution of Marihuana (other than to a minor) § 13A-12-211
Rape I § 13A-6-61	Possession Forged Instrument II § 13A-9-6	Sale/Distribution of Schedule I-V (other than to a minor) § 13A-12-211
Rape II § 13A-6-62	Theft of Property I § 13A-8-3	
Robbery I § 13A-8-41	Theft of Property II § 13A-8-4	
Robbery II § 13A-8-42	Receiving Stolen Property I § 13A-8-17	
Robbery III § 13A-8-43	Receiving Stolen Property II § 13A-8-18	
Sodomy I § 13A-6-63	Unauthorized Use/B&E Vehicle § 13A-8-11(a)(4) & (b)	
Sodomy II § 13A-6-64	Unlawful Possession/Use Credit/Debit Card § 13A-9-14	

## **Worksheets are Offense Specific**

Worksheets are intended for use only when the offense sentenced is a worksheet offense. They are not intended to provide guidance when sentencing similar crimes. The factors on the worksheets have been statistically derived specifically for the listed offenses and may or may not be statistically significant in predicting sentencing outcomes for other offenses.

## **The Most Serious Offense**

Worksheets must be completed and considered when the “most serious offense” at a sentencing event is a worksheet offense.

## **Sentencing Event**

A sentencing event includes all convictions sentenced at the same time whether included as counts in one case or in several different cases.

## **Determining the Most Serious Offense at a Sentencing Event**

Rule 1. Where two or more offenses at the same sentencing event are the same crime type (covered by the same worksheet), the most serious offense is the offense with the highest number of points shown on the corresponding Prison Sentence Length Worksheet.

Rule 2. Where two or more offenses at the same sentencing event are different crime types (covered by different worksheets), the most serious offense is the offense with the highest number of points shown on the Prison Sentence Length worksheets. The preparer may complete both worksheets and select the offense that results in the most severe penalty.

Example:

- ☐ If a defendant is being sentenced for Assault II (72 points) and Burglary II (70 points) at the same sentencing event, the worksheet preparer should first complete the Personal Sentencing Worksheets to determine the recommended sentencing outcome. This is because Assault II has the highest point value in the first section of the “personal” sentence length worksheet. Then, the preparer could elect to score Burglary II as the primary offense on the worksheets to determine which sentencing outcome would be most appropriate in this particular case.

Rule 3. Where a sentencing event includes both a worksheet offense and a non-worksheet offense and both carry the same statutory maximum penalty, the worksheet offense is the most serious offense. The other offense should be scored as an additional offense where appropriate.

Example:

- ☐ The maximum statutory penalty for Criminal Mischief I (with no prior felony convictions) is 10 years and the maximum statutory penalty for Assault II (with no prior felony convictions) is 10 years. If both are being sentenced at the same event, the worksheet preparer should score the

personal worksheets for Assault II. This is because Assault II is covered by the worksheets and Criminal Mischief I is not.

- In the above scenario, if worksheet offense was a drug or property offense, the non-worksheet offense(s) should be scored under the “Number of Additional Felony Convictions (Including Counts)” section of the Sentence Length Worksheets.

Rule 4. Where a sentencing event includes both a worksheet offense and a non-worksheet offense and the non-worksheet offense has a higher statutory maximum penalty, the non-worksheet offense is the most serious offense and the voluntary Sentencing Standards are not applicable.

### **Completing the In/Out Worksheet and the Prison Sentence Length Worksheet**

Both the In/Out Worksheet and the Prison Sentence Length Worksheet applicable to the sentencing event must be completed even in the recommendation is “non-prison.”

### **Rules for Scoring Prior Records**

*Date of Prior Records* - Prior records are to be scored based on convictions, juvenile delinquency and/or youthful offender adjudications occurring before the arrest date(s) of the offense(s) sentenced.

*Ambiguous Prior Records* - If an ambiguous entry on a prior record document cannot be resolved, the worksheet preparer should treat the information in a way that gives the benefit of the doubt to the offender. If any prior record disposition information is missing, the worksheet preparer should assume that no conviction occurred.

*Burden and Manner of Proving Prior Records* - In the event of a dispute, the burden of proving the prior record is on the prosecutor. For purposes of proving in-state prior convictions, any official court document – whether automated or hard copy – shall be sufficient for meeting the burden or proof requirement. When meeting the burden or proof for out of state convictions, certified copies of official court records shall be sufficient evidence. Out of state records need not be exemplified.

*Prior Nolo Contendere Dispositions* – Matters disposed of by pleas of *nolo contendere* or “no-contest” should be counted as prior convictions for worksheet purposes. In addition, any incarceration resulting from a plea of *nolo contendere* should be counted in the appropriate places on the worksheets.

*Effect of Pardons* – In the event a defendant has received a pardon for innocence, the conviction for which he or she received the pardon should be excluded when scoring prior convictions. All other pardons –e.g. those to restore voting rights – should not be excluded.

*Prior Misdemeanor or violation convictions* – All *criminal* convictions should be counted. Traffic convictions do not count except: Driving Under the Influence, Boating Under the Influence, Leaving the Scene of an Accident, Attempting to Elude Law



Enforcement, Driving Without a License, and Driving While license is Suspended or Revoked.

*Prior DUI convictions* – All misdemeanor DUI convictions occurring before the arrest date for the current offense should be counted as priors, even when the worksheets are being completed for Felony DUI.

### **Time for Completing Worksheets and Determining Recommendations**

Worksheets must be completed prior to the imposition of sentence in sufficient time for review by all parties and the sentencing judge.

In pre-trial diversion cases and drug court cases, worksheets are not required until a sentence is imposed. Some courts impose a sentence as soon as an offender enters drug court. In these courts, worksheets are required to be completed “up front.” In other courts, sentencing does not occur unless the offender “flunks out” of the drug court program. In these courts, the worksheets may be filled out any time prior to sentencing, giving sufficient notice to all parties and the judge.

### **Sentence Lengths**

Where Prison is the sentence disposition on the In/Out Worksheet, the prison sentence must be chosen from within the recommended range for the corresponding score on the Prison Sentence Length Ranges Table for the most serious offense worksheet offense type.

If a score on the Prison Sentence Length Worksheet falls between two scores listed on the Sentence Length Ranges Table, select the lower of the two scores to determine the recommended sentence range.

When choosing a sentence from the recommended sentence range, the sentence chosen must not be less than the statutory sentences specified in Section 13A-5-6(a)(1)-(3), provided, however, the minimum sentence may still be “split” pursuant to Section 15-18-8.

1. For a Class A felony, the minimum sentence imposed must be at least 120 months.
2. For a Class B felony, the minimum sentence imposed must be at least 24 months.
3. For a Class C felony, the minimum sentence imposed must be at least 12 months and 1 day.

A recommended sentence of 13 months includes any portion of the 13<sup>th</sup> month, i.e. 12 months and 1 day.

Sentence lengths recommended on the worksheets are intended to give guidance in imposing prison sentences. They are not intended to suggest terms of probation. Compliance with the Voluntary Sentencing Standards occurs when the sentence conforms to the recommendation on the In/Out Worksheet and,

where prison is recommended, the prison sentence length conforms to the recommended sentence range on the Prison Sentence Length Worksheet, or

where non-prison is recommended, the total suspended sentence length conforms to either the recommended sentence range on the Prison Sentence Length Worksheet or any other sentence length authorized by law.

In other words, where the In/Out Worksheet recommendation is non-prison, the total suspended sentence need not conform to the prison sentence length recommendation. The length of probation terms authorized by law is not affected by the Voluntary Sentencing Standards.

### **Judge's Colloquy in Guilty Pleas**

The court's obligation to advise the defendant as to the statutory range of punishment prior to accepting a guilty plea is not affected by the voluntary sentencing standards.

### **Imposition of Sentence**

Once a sentence has been selected from the recommended Prison Sentence Length Range Table, the sentencing judge may determine how that sentence shall be imposed for that sentencing event.

Example:

If a defendant is sentenced for three felonies at one sentencing event and the chosen sentence is 360 months (30 years) the judge may impose the sentence as:

- o 360 months for each conviction to run concurrently;
- o 120 months for each conviction to run consecutively; or
- o one 240 month sentence and two 60 month sentences to run consecutively.

#### **4. Mechanics of Completing the Worksheets**

Because of the multiple ways in which sentencing occurs in Alabama, there is no requirement concerning which worksheet is completed first. It is suggested, however, the preparer first complete the case information at the top of the In/Out Worksheet.

##### **a. PRISON IN/OUT WORKSHEET**

**Step A** - Complete the case information at the top of the In/Out Worksheet and the Prison Sentence Length Worksheet. Please print.

*Defendant* – fill in the defendant’s name as it appears in the court case file.

*Case No.* – fill in the case number for the most serious offense for the sentencing event.

*Judge* – fill in the name of the judge presiding over sentencing in the case.

*DA/Asst. DA* – fill in the name of the attorney representing the state at this sentencing event.

*Probation Officer* – fill in the name of the probation officer assigned to this case.

*Defense Attorney* – fill in the name of the attorney representing the defendant at sentencing, or if more than one attorney, the lead attorney in the case.

*Worksheet Preparer, Title* – fill in the name and the title of the worksheet preparer.

*List Additional Cases Sentenced for this Event* – If there are two or more cases sentenced at this sentencing event, fill in the case numbers for the additional cases. Also include additional counts by listing the specific additional convicted offenses.

Defendant _____	Case No. _____
Judge _____	DA/Asst. DA _____
Probation Officer _____	Defense Attorney _____
Worksheet Preparer, Title _____	
List Additional Cases Sentenced for this Event _____	

**Step B** – Complete the Sentencing Factors Section, adding the score for each section. See the instructions for each worksheet.

**Step C – Prison In/Out Worksheet:**

1. Total the scores from the Sentencing Factors Section and record the total score in the Total Score box.
2. Circle the recommendation (non-prison or prison) that conforms to the total score.

<b>Drug In/Out Recommendation</b>	<b>Total Score</b>	<input type="checkbox"/>
1-7 points: Non-Prison	8 or more points: Prison	

<b>Property In/Out Recommendation</b>	<b>Total Score</b>	<input type="checkbox"/>
8-14 points: Non-Prison	15 or more points: Prison	

<b>Personal In/Out Recommendation</b>	<b>Total Score</b>	<input type="checkbox"/>
1-7 points: Non-Prison	8 or more points: Prison	

**Step D –** When the actual sentence is imposed, record the disposition of sentence by checking the appropriate disposition on the In/Out worksheet.

Probation	_____	Department of Corrections	_____
Community Corrections Probation	_____	DOC at Community Corrections	_____
County Jail / Work Release	_____	DOC Split Sentence	_____
Other Alternative	_____		
Reason Recommendation Not Accepted			

**Step E –** After sentencing, if the judge departs from the In/Out worksheet recommendation, the Alabama Sentencing Commission asks that the reason for the departure be stated here.

Reason Recommendation Not Accepted
_____

## **b. PRISON SENTENCE LENGTH WORKSHEET**

**Step A** - Complete the case information at the top of the Prison Sentence Length Worksheet.

*Defendant* – fill in the defendant’s name as it appears in the court case file.

*Case No.* – fill in the case number for the most serious offense for the sentencing event.

**Step B** – Complete the Sentencing Factors Section, adding the score for each section. See the instructions for each worksheet.

**Step C** - Prison Sentence Length Worksheet:

1. Total the scores from the Sentencing Factors Section and record the total score in the Total Score box.
2. Go to the Prison Sentence Length Range table and select the sentence ranges that conform to the total score.
3. Record the recommended ranges on the Prison Sentence Length Worksheet.

**Step D** - Record the actual sentenced imposed by the sentencing judge.

**Step E** - If the sentence imposed does not fall within the recommended sentence ranges, a departure occurs. If a departure from the Sentence Length range occurs, record the Reason for the Departure.

<b>Prison Sentence Length Recommendation</b>	<b>Total Score</b> <input type="text"/>
Recommended Sentence Range ____ to ____ (straight) ____ to ____ (split)	
Actual Sentence Imposed _____	
Reason did Not Accept Sentence Length Recommendation _____	

## PRISON SENTENCE LENGTH RANGES FOR WORKSHEET

This table contains recommended sentence length ranges from which a sentence imposed under the Voluntary Sentencing Standards is chosen.

The table is divided into three sections or column groups.

1. The first column is a list of scores in actual cases analyzed by the Alabama Sentencing Commission in developing the worksheets and standards.
2. The next three columns (Total Sentence) list the recommended sentence ranges from which a sentence may be chosen.
3. The last three columns (Time to Serve on Split) list the recommended sentence ranges for the incarceration portion of a split sentence in the event the judge chooses to impose a split sentence.

<i>Step B</i>				<i>Step C</i>		
<i>Step A</i>	Total Sentence			Time to Serve On Split		
<u>Score</u>	<u>Low</u>	<u>Mid</u>	<u>High</u>	<u>Low</u>	<u>Mid</u>	<u>High</u>
<b>32</b>	13	18	23	6	9	12
<b>37</b>	13	22	31	6	9	12
<b>39</b>	13	22	31	6	9	12
<b>42</b>	13	22	31	6	9	12
<b>44</b>	13	22	31	6	9	12
<b>45</b>	13	22	31	6	9	12
<b>46</b>	13	22	31	6	9	12
<b>47</b>	13	22	31	6	9	12
<b>49</b>	14	23	31	6	9	12
<b>51</b>	14	23	31	6	9	12
<b>52</b>	14	27	38	6	9	12
<b>53</b>	14	27	38	6	9	12
<b>54</b>	14	27	38	6	9	12
<b>55</b>	14	27	38	6	9	12
<b>56</b>	14	31	46	6	9	12
<b>57</b>	14	31	46	6	9	12
<b>58</b>	14	31	46	6	9	12

This table is not intended to encourage or discourage the use of split sentences. The use of splits remains a matter entirely within the discretion of the sentencing judge.

**Step A** - Find the score that matches or, if no match is found, the next lower score corresponds to the Total Score on the Prison Sentence Length Worksheet.

**Step B** – Identify the recommended sentence range for that score in “Total Sentence” columns.

**Step C** - Identify the matching recommended sentence range for the incarceration portion of a split sentence from the “Time to Serve on Split” columns.

Record the recommended sentence ranges on the Prison Sentence Range Worksheet.

**Final Step** - Transmit the completed worksheets (Prison In/Out and Prison Sentence Length) to the Court Clerk for forwarding to the Alabama Sentencing Commission.

**Alabama Sentencing Commission  
300 Dexter Avenue  
Suite 2-230  
Montgomery, AL 36104-3741  
Fax: (334) 954-5201**

## **Voluntary Sentencing Standards & Worksheets**

The Drug offenses listed below are covered by the Voluntary Sentencing Standards & Worksheets.

### **Most Serious Offense at Conviction Ranking**

Sale/Distribution of Schedule I-V (other than to minor) – 113 points  
§ 13A-12-211

Sale/Distribution of Marihuana (other than to minor) – 84 points  
§ 13A-12-211

Unlawful Possession of a Controlled Substance – 71 points  
§ 13A-12-212

Felony DUI – 42 points  
§ 32-5a-191(h)

Possession of Marihuana I – 42 points  
§ 13A-12-213



# INSTRUCTIONS - - Drug Prison In/Out Worksheet

1

## Case Information Section

Complete prior to sentencing. See the General Instructions to complete this section.

2

## Sentencing Factors Section

Complete prior to sentencing.

3

## Most Serious Conviction Offense -

Following the general instructions, the scorer should select only the most serious offense being sentenced at the current sentencing event. Where two or more offenses have the same score, circle the specific offense scored as the most serious conviction offense on this worksheet. The scorer should enter the number of points assigned to the most serious offense.

4

## Number of Prior Adult Felony Convictions

- Count all felony convictions that occurred prior to the arrest date(s) of the offense(s) being sentenced at the current sentencing event.

5

## Number of Prior Adult Convictions for Misdemeanors or Violations

- Count all criminal convictions for misdemeanor offenses or violations that occurred prior to the arrest date(s) of the offense(s) being sentenced at the current sentencing event. Only include the serious traffic offenses of (1) DUI, (2) BUI, (3) Leaving the Scene of an Accident, (4) Attempting to Elude, (5) Driving without a License or (6) Driving while License is Suspended or Revoked.

6

## Prior Incarceration with Sentence Imposed of 1 Year or More

- Count prior prison, jail or Department of Corrections/ community corrections sentences where the non-suspended time imposed was one year or greater. Count only sentences that occurred prior to the arrest date(s) of the offense(s) being sentenced.

7

## Prior Probation or Parole Revocation

- Count prior probation or parole revocations that occurred prior to the arrest date(s) of the offense(s) being sentenced at the current sentencing event. Only felony probation revocations should be scored.

8

## Number of Prior Juvenile Delinquency or Youthful Offender Adjudications

- Count all juvenile delinquency and Youthful Offender adjudications that occurred prior to the arrest date(s) of the offense(s) being sentenced at the current sentencing event. *Note: use the definition*

*for misdemeanors or violations as set out in factor #5.*

9

## Possession/Use of a Deadly Weapon or Dangerous Instrument

- Count this factor if there was a connection other than the mere possession of a weapon between the presence of a deadly weapon (or dangerous instrument) and the commission of any of the offense(s) being sentenced at the current sentencing event. This factor should not be counted if the deadly weapon or dangerous instrument is merely "loot" or proceeds of a sale. For the purpose of completing the worksheets, a deadly weapon or dangerous instrument shall be defined pursuant to Sections 13A-1-2 and 13A-11-72.

10

## Recommendation Section

**Total Score** - Prior to sentencing, total the scores from the Sentencing Factors Section. If the total score is 1 through 7 points, then a non-prison sentence is recommended for the offender. If the total score is 8 or more points, a prison sentence is recommended.

11

## Non-Prison: 1-7 Points

Several options are given for imposing a non-prison sentence. Some of these options are shown on the worksheet. One of these options must be checked to complete the worksheet. Check only one option. *Probation* should be checked if the offender is sentenced to traditional probation.

*Community Corrections Probation* should be checked if the offender is sentenced to community corrections as a condition of probation.

*County Jail/Work Release* should be checked if the offender is sentenced to a term in the county jail. *Note: For worksheet purposes, a sentence to the county jail and/or county work release is considered a non-prison sentence.*

*Other Alternative* should be checked when a non-prison alternative, other than those listed, is used.

*The sentence disposition type should be checked even if it is not consistent with the recommended disposition. This information will be useful for possible modification of the worksheet recommendations.*

12

## Prison: 8 or more points

Several prison alternatives are provided. *Department of Corrections* should be checked if the sentence is a straight prison sentence.

*DOC at Community Corrections* should be checked if the offender is sentenced to DOC and ordered to a community corrections program.

*DOC Split Sentence* should be checked if the sentence is a split sentence. Any split to be served in DOC or DOC Community Corrections is considered a prison sentence.

*The sentence disposition type should be checked even if it is not consistent with the recommended disposition. This information will be useful for possible modification of the worksheet recommendations.*

13

## Reason Recommendation Not Accepted

This section need be completed only on the copy of the worksheet provided to the court clerk.

If the sentencing judge decides that the In/ Out recommendation does not fit this case, the judge or his or her designee, is asked to give a reason why the recommendation was not followed. The reason given should be stated here and will be used by the Sentencing Commission to evaluate the effectiveness of the standards. Reasons may include but are not limited to the following:

### More severe

- Worksheets do not express the severity of criminality of the offender's history.
- No alternatives to prison available.
- Offender needs long-term substance abuse treatment available only through the Department of Corrections.
- Deserves greater punishment considering injury to victim.

### Less severe

- The worksheets exaggerate the severity of the offender's prior history.
- The recommended sentence punishes too harshly or too leniently.
- Offender shows sufficient progress toward rehabilitation to allow alternative to prison.

Please Print

# Drug Prison In/Out Worksheet

**1** Defendant \_\_\_\_\_ Case No. \_\_\_\_\_  
Judge \_\_\_\_\_ DA/Asst. DA \_\_\_\_\_  
Probation Officer \_\_\_\_\_ Defense Attorney \_\_\_\_\_  
Worksheet Preparer, Title \_\_\_\_\_  
List Additional Cases Sentenced for this Event \_\_\_\_\_

**2**

**3** Most Serious Conviction Offense                      Please circle one offense

Possession of Marihuana or Controlled Substance .....	1
Felony DUI .....	4
Sale/Distribution of Marihuana (other than to minor) .....	6
Sale/Distribution of Schedule I-V (other than to minor) .....	6

Score

**4** Number of Prior Adult Felony Convictions                     

None .....	0
1 .....	2
2 .....	3
3 .....	5
4 .....	6
5 or more .....	7

Score

**5** Number of Prior Adult Convictions for Misdemeanors or Violations                     

0-1 .....	0
2-5 .....	1
6-9 .....	2
10 or more .....	3

Score

**6** Prior Incarceration with Sentence Imposed of 1 Year or More                     

If Yes ..... 3

Score

**7** Prior Probation or Parole Revocation                     

If Yes ..... 1

Score

**8** Number of Prior Juvenile Delinquency or YO Adjudications (Violation/Misd/Felony)                     

0 .....	0
1-2 .....	1
3-4 .....	2
5 or more .....	3

Score

**9** Possession/Use of a Deadly Weapon or Dangerous Instrument                     

If Yes ..... 2

Score

## Recommendation

<b>11</b> 1-7 points: Non-Prison	<b>12</b> 8 or more points: Prison	<b>10</b> Total Score <input type="text"/>
Probation _____	Department of Corrections _____	
Community Corrections Probation _____	DOC at Community Corrections _____	
County Jail/Work Release _____	DOC Split Sentence _____	
Other Alternative _____		
<b>13</b> Reason Recommendation <b>Not</b> Accepted _____		

# INSTRUCTIONS - - Drug Prison Sentence Length Worksheet

The Drug Prison Sentence Length Worksheet is intended for use where a prison sentence is recommended on the In/Out worksheet. The sentencing standards were developed based on prison sentences actually imposed. These sentences may, however, be used as a guide when the recommendation is non-prison so long as other laws regarding limits on the length of probation are followed.

The Case Information and Sentencing Factors section of this worksheet must be completed prior to sentencing.

## 1 Case Information Section

Enter the Defendant's name and Case Number even if it has already been entered on the In/Out worksheet.

## 2 Sentencing Factors Section

Complete prior to sentencing.

## 3 Most Serious Conviction Offense –

Following the general instructions, the scorer should select only the most serious offense being sentenced at the current sentencing event. Where two or more offenses have the same score, circle the specific offense scored as the most serious conviction offense on this worksheet. The scorer should enter the number of points assigned to the most serious offense.

## 4 Number of Additional Felony

**Convictions (Including Counts)** – The scorer should total all offenses being sentenced other than the most serious offense being sentenced at the present time. In the event of a multi-count indictment, all counts in which the defendant was found guilty or entered a guilty plea should be counted the same as separate convictions.

## 5 Number of Prior Adult Felony

**Convictions** – Count all felony convictions that occurred prior to the arrest date(s) of the offense(s) being sentenced at the current sentencing event.

## 6 Number of Prior Adult Felony Class C

**Convictions** – Count only the number of Class C felony convictions that occurred prior to the arrest date(s) of the offense(s) being sentenced at the current sentencing event.

## 7 Prior Incarceration with Sentence

**Imposed of 1 Year or More** – Count prior prison, jail or Department of Corrections/ community corrections sentences where the non-suspended time imposed was one

year or greater. Count only sentences that occurred prior to the arrest date(s) of the offense(s) being sentenced.

## Prison Sentence Length Recommendation

8 **Total Score** – Total the scores from the Sentencing Factors Section.

9 **Recommended Sentence Range** – Go to the Drug Prison Sentence Ranges for Worksheet Table to convert the score into a sentence length recommendation. Record the recommended sentence range for the total sentence in the space identified as “straight”. Record the recommended split sentence range in the space provided. The prison sentence for the most serious offense must come from these tables to comply with the standards. Statutory enhancements, as they have been applied, have been factored into the sentence length table recommendations and should *not* be added.

10 **Actual Sentence Imposed** – Enter the actual sentence imposed, including the split if a split is imposed.

*Example:* 36 months, split to serve 12 months with 24 months probation.

*Example:* 60 months, split to serve 24 months with 12 months probation.

*Example:* 60 months

*Note: the disposition of the prison sentence, DOC custody, DOC at Community Corrections, or DOC split should also be checked on the In/Out worksheet.*

## Reason Recommendation Not

11 **Accepted** – If the sentencing judge decides that no sentence length recommendation fits this case, the judge or another person designated by the judge, is asked to give a reason why the recommendation was not followed. The reason given should be stated here and will be used by the Sentencing Commission to evaluate the effectiveness of the standards. Reasons may include but are not limited to the following:

More severe

- Worksheets do not express the severity of criminality of the offender's history.
- No alternatives to prison available.
- Offender needs long-term substance abuse treatment available only through the Department of Corrections.

- Deserves greater punishment considering injury to victim.

Less severe

- The worksheets exaggerate the severity of the offender's prior history.
- The recommended sentence punishes too harshly or too leniently.
- Offender shows sufficient progress toward rehabilitation to allow alternative to prison.

After sentencing, the completed worksheet must be given to the court clerk to forward to the Alabama Sentencing Commission, along with the Prison In/Out worksheet.

Please Print

## Drug Prison Sentence Length Worksheet

1 Defendant \_\_\_\_\_ Case No. \_\_\_\_\_

2 \_\_\_\_\_  
3 Most Serious Conviction Offense Please circle one offense

Felony DUI/ Possession of Marihuana ..... 42  
Unlawful Possession of a Controlled Substance ..... 71  
Sale/Distribution of Marihuana (other than to minor) ..... 84  
Sale/Distribution of Schedule I-V (other than to minor) ..... 113

Score

4 Number of Additional Felony Convictions (Including Counts) \_\_\_\_\_

None ..... 0  
1 ..... 15  
2 ..... 29  
3 ..... 44  
4 or more ..... 58

Score

5 Number of Prior Adult Felony Convictions \_\_\_\_\_

None ..... 0  
1 ..... 10  
2 ..... 20  
3 ..... 30  
4 ..... 40  
5 or more ..... 50

Score

6 Number of Prior Adult Felony Class C Convictions \_\_\_\_\_

None ..... 0  
1 ..... 7  
2 ..... 14  
3 ..... 21  
4 ..... 28  
5 ..... 35  
6 ..... 43  
7 or more ..... 50

Score

7 Prior Incarceration with Sentence Imposed of 1 Year or More \_\_\_\_\_

If Yes ..... 14

Score

See Prison Sentence Length  
Recommendation Table

8 Total Score

9 Recommended Sentence Range \_\_\_\_\_ to \_\_\_\_\_ (straight) \_\_\_\_\_ to \_\_\_\_\_ (split)

10 Actual Sentence Imposed \_\_\_\_\_

11 Reason did **not** accept sentence length recommendation \_\_\_\_\_



## Drug Prison Sentence Length Ranges for Worksheet

Time in Months

<u>Score</u>	<u>Total Sentence</u>			<u>Time to Serve On Split</u>		
	<u>Low</u>	<u>Mid</u>	<u>High</u>	<u>Low</u>	<u>Mid</u>	<u>High</u>
<b>42</b>	13	23	32	6	9	12
<b>49</b>	13	23	32	6	10	14
<b>52</b>	13	23	32	6	10	14
<b>56</b>	13	23	32	6	10	14
<b>57</b>	13	23	32	6	10	14
<b>59</b>	13	23	32	6	10	14
<b>62</b>	13	23	32	6	10	14
<b>64</b>	13	23	32	6	10	14
<b>66</b>	13	23	32	6	12	18
<b>67</b>	13	23	32	6	12	18
<b>69</b>	13	23	32	6	12	18
<b>70</b>	13	23	32	6	12	18
<b>71</b>	13	23	32	6	12	18
<b>72</b>	13	23	32	6	12	18
<b>73</b>	13	23	32	6	12	18
<b>74</b>	13	23	32	6	12	18
<b>76</b>	13	39	65	6	12	18
<b>77</b>	13	39	65	6	12	18
<b>78</b>	13	39	65	6	17	27
<b>79</b>	13	39	65	6	17	27
<b>80</b>	13	39	65	8	18	27
<b>81</b>	13	39	65	8	18	27
<b>82</b>	13	39	65	8	18	27
<b>83</b>	13	39	65	8	18	27
<b>84</b>	13	39	65	8	18	27
<b>86</b>	13	39	65	8	18	27
<b>87</b>	13	39	65	8	18	27
<b>88</b>	13	39	65	8	18	27
<b>89</b>	13	39	65	8	18	27
<b>90</b>	13	39	65	8	18	27
<b>91</b>	13	39	65	8	18	27
<b>92</b>	13	39	65	8	18	27
<b>93</b>	13	39	65	8	18	27
<b>94</b>	13	39	65	8	18	27
<b>95</b>	13	39	65	8	18	27
<b>96</b>	13	39	65	8	18	27
<b>97</b>	13	39	65	8	18	27
<b>98</b>	13	39	65	8	18	27
<b>99</b>	13	39	65	8	18	27
<b>100</b>	13	39	65	8	18	27
<b>101</b>	13	39	65	8	18	27
<b>102</b>	13	39	65	8	18	27
<b>103</b>	13	39	65	8	18	27
<b>104</b>	13	55	97	8	18	27
<b>105</b>	15	56	97	8	18	27
<b>106</b>	15	56	97	8	18	27
<b>107</b>	15	56	97	8	18	27
<b>108</b>	15	56	97	8	18	27
<b>109</b>	15	56	97	8	18	27

<b>Score</b>	<b>Total Sentence</b>			<b>Time to Serve On Split</b>		
	<b><u>Low</u></b>	<b><u>Mid</u></b>	<b><u>High</u></b>	<b><u>Low</u></b>	<b><u>Mid</u></b>	<b><u>High</u></b>
<b>110</b>	15	56	97	8	18	27
<b>111</b>	15	56	97	8	18	27
<b>112</b>	15	56	97	8	18	27
<b>113</b>	15	56	97	8	18	27
<b>115</b>	15	56	97	8	18	27
<b>116</b>	15	56	97	8	18	27
<b>117</b>	15	56	97	8	18	27
<b>118</b>	15	56	97	8	18	27
<b>119</b>	15	56	97	8	18	27
<b>120</b>	15	56	97	8	18	27
<b>121</b>	15	56	97	8	18	27
<b>122</b>	15	56	97	8	18	27
<b>123</b>	15	56	97	8	18	27
<b>124</b>	15	56	97	8	18	27
<b>125</b>	15	56	97	8	18	27
<b>126</b>	18	58	97	8	18	27
<b>127</b>	18	58	97	8	18	27
<b>128</b>	18	58	97	8	18	27
<b>130</b>	18	58	97	8	18	27
<b>132</b>	18	58	97	8	18	27
<b>133</b>	18	58	97	8	18	27
<b>134</b>	18	58	97	8	18	27
<b>135</b>	18	58	97	8	18	27
<b>136</b>	18	58	97	8	18	27
<b>137</b>	18	58	97	8	18	27
<b>138</b>	18	58	97	8	18	27
<b>139</b>	18	58	97	8	18	27
<b>140</b>	18	58	97	8	18	27
<b>141</b>	21	62	104	8	18	27
<b>142</b>	21	62	104	8	18	27
<b>143</b>	21	62	104	8	18	27
<b>144</b>	21	62	104	8	18	27
<b>145</b>	21	62	104	8	18	27
<b>146</b>	21	62	104	8	18	27
<b>147</b>	21	62	104	8	18	27
<b>148</b>	24	64	104	8	18	27
<b>149</b>	24	64	104	8	18	27
<b>150</b>	24	64	104	8	18	27
<b>152</b>	24	64	104	8	18	27
<b>154</b>	30	67	104	12	20	27
<b>155</b>	30	67	104	12	20	27
<b>156</b>	30	67	104	12	20	27
<b>157</b>	30	67	104	12	20	27
<b>158</b>	30	67	104	12	20	27
<b>159</b>	30	67	104	12	20	27
<b>160</b>	30	67	104	12	20	27
<b>161</b>	30	67	104	12	20	27
<b>162</b>	30	67	104	12	20	27
<b>163</b>	30	67	104	12	20	27
<b>164</b>	30	67	104	12	20	27
<b>165</b>	30	67	104	12	20	27
<b>166</b>	30	67	104	12	20	27
<b>167</b>	30	67	104	12	20	27

<u>Score</u>	<b>Total Sentence</b>			<b>Time to Serve On Split</b>		
	<u>Low</u>	<u>Mid</u>	<u>High</u>	<u>Low</u>	<u>Mid</u>	<u>High</u>
168	30	67	104	12	20	27
169	30	67	104	12	20	27
170	30	67	104	12	20	27
171	30	67	104	12	20	27
172	36	70	104	12	20	27
173	36	70	104	12	20	27
174	36	70	104	12	20	27
176	36	70	104	12	20	27
177	36	70	104	12	24	36
178	36	70	104	12	24	36
181	45	87	130	16	26	36
182	45	87	130	16	26	36
183	45	87	130	16	26	36
184	45	87	130	16	26	36
185	45	87	130	16	26	36
188	45	87	130	24	30	36
189	45	87	130	24	30	36
191	45	87	130	24	30	36
192	45	87	130	24	30	36
195	45	87	130	24	30	36
196	45	87	130	24	30	36
198	45	87	130	24	30	36
199	45	87	130	24	30	36
200	45	87	130	24	30	36
203	45	87	130	24	30	36
205	45	87	130	24	30	36
206	45	87	130	24	30	36
212	45	87	130	24	30	36
213	45	87	130	24	30	36
214	45	87	130	24	30	36
220	45	87	130	24	30	36
222	45	87	130	24	30	36
227	45	87	130	24	30	36
232	45	87	130	24	30	36
235	45	87	130	24	30	36
242	45	87	130	24	30	36





## **Voluntary Sentencing Standards & Worksheets**

The Property offenses listed below are covered by the Voluntary Sentencing Standards & Worksheets.

### **Most Serious Offense at Conviction Ranking**

Burglary I – 275 points  
§13A-7-5

Burglary II – 70 points  
§13A-7-6

Theft of Property I – 58 points  
§13A-8-3

Receiving Stolen Property I – 58 points  
§13A-8-17

Theft of Property II – 46 points  
§13A-8-4

Receiving Stolen Property II – 46 points  
§13A-8-18

Burglary III – 45 points  
§13A-7-7

Forgery II – 44 points  
§13A-9-3

Possession of a Forged Instrument II – 42 points  
§13A-9-6

Possession/Use Credit/Debit Card – 39 points  
§13A-9-14

Unauthorized Use<sup>1</sup>/B&E Vehicle – 32 points  
§13A-8-11 (a)(4) & (b)

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<sup>1</sup> Only includes felony Unauthorized Use of a Motor Vehicle, Section 13A-8-11, Code of Alabama 1975.

# INSTRUCTIONS - - Property Prison In/Out Worksheet

1

## Case Information Section

Complete prior to sentencing. See the General Instructions to complete this section.

2

## Sentencing Factors Section

Complete prior to sentencing.

3

## Most Serious Conviction Offense –

Following the general instructions, the scorer should select only the most serious offense being sentenced at the current sentencing event. Where two or more offenses have the same score, circle the specific offense scored as the most serious conviction offense on this worksheet. The scorer should enter the number of points assigned to the most serious offense.

4

## Number of Prior Adult Felony

**Convictions-** Count all felony convictions that occurred prior to the arrest date(s) of the offense(s) being sentenced at the current sentencing event.

5

## Number of Prior Adult Convictions for

**Same Felony** - Count all felony convictions for the same offense that occurred prior to the arrest date of the most serious offense being sentenced at the current sentencing event. Only count those offenses where the crime and the degree are identical to the current offense. For instance, if the current most serious offense is Burglary I, then a prior Burglary II or III conviction would not be scored.

6

## Number of Prior Adult Convictions for

**Misdemeanors or Violations** - Count all criminal convictions for misdemeanor offenses or violations that occurred prior to the arrest date(s) of the offense(s) being sentenced at the current sentencing event. Only include the serious traffic offenses of (1) DUI, (2) BUI, (3) Leaving the Scene of an Accident, (4) Attempting to Elude, (5) Driving without a License or (6) Driving while License is Suspended or Revoked.

7

## Prior Incarceration with Sentence

**Imposed of 1 Year or More** - Count prior prison, jail or Department of Corrections/ community corrections sentences where the non-suspended time imposed was one year or greater. Count only sentences that occurred prior to the arrest date(s) of the offense(s) being sentenced.

8

## Prior Incarceration with Sentence

**Imposed of Less Than 1 Year** - Count prior prison, jail sentences or Department of Corrections/community corrections sentences where the non-suspended time imposed was less than one year. Count only sentences that occurred prior to the arrest date(s) of the offense(s) being sentenced.

9

## Prior Probation or Parole Revocation -

Count probation or parole revocations that occurred prior to the arrest date(s) of the offense(s) being sentenced at the current sentencing event. Only felony probation revocations should be scored.

10

## Number of Prior Juvenile Delinquency or Youthful Offender Adjudications -

Count all juvenile delinquency and Youthful Offender adjudications that occurred prior to the arrest date(s) of the offense(s) being sentenced at the current sentencing event. *Note: use the definition for misdemeanors or violations as set out in factor #6.*

11

## Possession/Use of a Deadly Weapon or

**Dangerous Instrument** - Count this factor if there was a connection other than the mere possession of a weapon between the presence of a deadly weapon (or dangerous instrument) and the commission of any of the offense(s) being sentenced at the current sentencing event. This factor should not be counted if the deadly weapon or dangerous instrument is merely “loot” or proceeds of a sale. For the purpose of completing the worksheets, a deadly weapon or dangerous instrument shall be defined pursuant to Sections 13A-1-2 and 13A-11-72.

12

## Injury to Victim –

Count this factor if a victim suffered physical injury or serious physical injury during the commission or flight from the offense. For the purposes of completing the worksheet, physical injury shall be defined pursuant to Section 13A-1-2 (12), Code of Alabama 1975 and serious physical injury shall be defined pursuant to Section 13A-1-2 (14), Code of Alabama 1975.

13

## Recommendation Section

**Total Score** – Prior to sentencing, total the scores from the Sentencing Factors Section. If the total score is 8 through 14 points, then a non-prison sentence is recommended for the offender. If the total score is 15 or more points, a prison sentence is recommended.

14

## Non-Prison: 8-14 Points

Several options are given for imposing a non-prison sentence are shown on the worksheet. One of these options must be checked to complete the worksheet. Check only one option.

*Probation* should be checked if the offender is sentenced to traditional probation.

*Community Corrections Probation* should be checked if the offender is sentenced to community corrections as a condition of probation.

*County Jail/Work Release* should be checked if the offender is sentenced to a term in the county jail. *Note: A sentence to the county jail and/or county work release is considered a non-prison sentence.*

*Other Alternative* should be checked when a non-prison alternative, other than those listed, is used.

*The sentence disposition type should be checked even if it is not consistent with the recommended disposition. This information will be useful for possible modification of the worksheet recommendations.*

15

**Prison: 15 or more points** Several prison alternatives are provided.

*Department of Corrections* should be checked if the sentence is a straight prison sentence. *DOC at Community Corrections* should be checked if the offender is sentenced to DOC and ordered to a community corrections program.

*DOC Split Sentence* should be checked if the sentence is a split sentence. Any split to be served in DOC or DOC Community Corrections is considered a prison sentence.

*The sentence disposition type should be checked even if it is not consistent with the recommended disposition. This information will be useful for possible modification of the worksheet recommendations.*

16

## Reason Recommendation Not Accepted –

Complete only on the copy of the worksheet provided to the court clerk. If the sentencing judge decides that the In/Out recommendation does not fit this case, the judge or another person designated by the judge, is asked to give a reason why the recommendation was not followed. Reasons may include but are not limited to the following:

More severe

- Worksheets do not express the severity of criminality of the offender's history.
- No alternatives to prison available.
- Offender needs long-term substance abuse treatment available only through the Department of Corrections.
- Deserves greater punishment considering injury to victim.

Less severe

- The worksheets exaggerate the severity of the offender's prior history.
- The recommended sentence punishes too harshly or too leniently.
- Offender shows sufficient progress toward rehabilitation to allow alternative to prison.

Please Print

# Property Prison In/Out Worksheet

1 Defendant \_\_\_\_\_ Case No. \_\_\_\_\_  
Judge \_\_\_\_\_ DA/Asst. DA \_\_\_\_\_  
Probation Officer \_\_\_\_\_ Defense Attorney \_\_\_\_\_  
Worksheet Preparer, Title \_\_\_\_\_  
2 List Additional Cases Sentenced for this Event \_\_\_\_\_

3 Most Serious Conviction Offense Please circle one offense  
Possession/Use Credit/Debit Card ..... 8 Burglary III ..... 11  
Possession Forged Instrument II, Forgery II, ..... 9 Burglary II ..... 13  
Theft of Prop II, Receive Stolen Prop II ..... 9 Burglary I ..... 14  
Theft of Prop I, Receive Stolen Prop I, ..... 10  
Unauthorized Use/B&E Vehicle ..... 10

Score

4 Number of Prior Adult Felony Convictions .....  
None ..... 0  
1-2 ..... 1  
3-4 ..... 2  
5 or more ..... 3

Score

5 Number of Prior Adult Convictions for Same Felony .....  
None ..... 0  
1 ..... 1  
2 ..... 2  
3-4 ..... 3  
5 or more ..... 4

Score

6 Number of Prior Adult Convictions for Misdemeanors or Violations .....  
0-1 ..... 0  
2-5 ..... 1  
6-9 ..... 2  
10 or more ..... 3

Score

7 Prior Incarceration with Sentence Imposed of 1 Year or More .....  
If Yes ..... 6

Score

8 Prior Incarceration with Sentence Imposed of Less Than 1 Year .....  
If Yes ..... 3

Score

9 Prior Probation or Parole Revocation .....  
If Yes ..... 2

Score

10 Number of Prior Juvenile Delinquency or YO Adjudications (Violation/Misd/Felony) .....  
None ..... 0  
1 ..... 1  
2-3 ..... 2  
4 ..... 3  
5 or more ..... 4

Score

11 Possession/Use of a Deadly Weapon or Dangerous Instrument .....  
If Yes ..... 1

Score

12 Injury to Victim .....  
If Yes ..... 2

Score

## Recommendation

13 Total Score

### 14 8-14 points: Non-Prison

Probation \_\_\_\_\_ Community Corrections Probation \_\_\_\_\_  
County Jail/Work Release \_\_\_\_\_ Other Alternative \_\_\_\_\_  
16 Reason Recommendation Not Accepted

### 15 15 or more points: Prison

Department of Corrections \_\_\_\_\_  
DOC at Community Corrections \_\_\_\_\_  
DOC Split Sentence \_\_\_\_\_

# INSTRUCTIONS - - Property Prison Sentence Length Worksheet

The Property Prison Sentence Length Worksheet is intended for use where a prison sentence is recommended on the In/Out worksheet. The sentencing standards were developed based on prison sentences actually imposed. These sentences may, however, be used as a guide when the recommendation is non-prison so long as other laws regarding limits on the length of probation are followed.

The Case Information and Sentencing Factors section of this worksheet must be completed prior to sentencing.

**1 Case Information Section**  
Enter the Defendant's name and Case Number even if it has already been entered on the In/Out worksheet.

**2 Sentencing Factors Section**  
Complete prior to sentencing.

**3 Most Serious Conviction Offense** - The scorer should select only the most serious offense being sentenced at the current sentencing event. (See General Instructions.)

**4 Number of Additional Felony Convictions (Including Counts)** - The scorer should total all offenses being sentenced other than the most serious offense being sentenced at the present time. In the event of a multi-count indictment, all counts in which the defendant was found guilty or entered a guilty plea should be counted the same as separate convictions. This does not include prior convictions - they are counted elsewhere.

**5 Number of Prior Adult Felony Convictions** - Count all felony convictions that occurred prior to the arrest date(s) of the offense(s) being sentenced at the current sentencing event.

**6 Number of Prior Adult Felony Property Convictions** - Count only the number of felony property convictions that occurred prior to the arrest date(s) of the offense(s) being sentenced at the current sentencing event.

**7 Prior Incarceration with Sentence Imposed of 1 Year or More** - Count prior prison, jail sentences or Department of Corrections/community corrections sentences where the non-suspended time imposed was one year or greater. Count only sentences that occurred prior to the arrest date(s) of the offense(s) being sentenced.

**8 Prior Probation or Parole Revocation** - Count probation or parole revocations that occurred prior to the arrest date(s) of the offense(s) being sentenced at the current sentencing event. Only felony probation revocations should be scored.

**9 Possession/Use of a Deadly Weapon or a Dangerous Instrument and/or Injury to Victim** - Count this if the offender used or brandished a deadly weapon or dangerous instrument. This factor should not be counted if the deadly weapon or dangerous instrument is merely "loot" or proceeds of a sale. There should be a connection other than the mere possession of the deadly weapon or dangerous instrument for this factor to be scored. For the purposes of completing the worksheets, a deadly weapon or dangerous instrument shall be defined pursuant to Sections 13A-1-2 and 13A-11-72.

Count this factor if a victim suffered physical injury or serious physical injury during the commission or flight from the offense. For the purposes of completing the worksheet physical injury shall be defined pursuant to Section 13A-1-2 (12), Code of Alabama 1975 and serious physical injury shall be defined pursuant to Section 13A-1-2 (14), Code of Alabama 1975.

Additionally, this factor should be counted if the defendant enters a dwelling with a deadly weapon whether or not it was used or brandished during the commission of the offense.

**10 Acquired a Firearm During Offense** - Count this if a firearm was acquired during the commission of the offense(s) being scored at the current sentencing event.

## Prison Sentence Length Recommendation

**11 Total Score** - Total the scores from the Sentencing Factors Section.

**12 Recommended Sentence Range** - Go to the Drug Prison Sentence Ranges for Worksheet Table to convert the score into a sentence length recommendation. Record the recommended sentence range for the total sentence in the space identified as "straight". Record the recommended split sentence range in the space provided. The prison sentence for the most serious offense must come from these tables to comply with the

standards. Statutory enhancements, as they have been applied, have been factored into the sentence length table recommendations and should *not* be added.

**13 Actual Sentence Imposed** - Enter the actual sentence imposed, including the split if a split is imposed.  
*Example:* 36 months, split to serve 12 months with 24 months probation.  
*Example:* 60 months, split to serve 24 months with 12 months probation.  
*Example:* 60 months  
*Note:* the disposition of the prison sentence, DOC custody, DOC at Community Corrections, or DOC split should also be checked on the In/Out worksheet.

**Reason Recommendation Not Accepted** - If the sentencing judge decides that no sentence length recommendation fits this case, the judge or another person designated by the judge, is asked to give a reason why the recommendation was not followed. The reason given should be stated here and will be used by the Sentencing Commission to evaluate the effectiveness of the standards. Reasons may include but are not limited to the following:

### More severe

- Worksheets do not express the severity of criminality of the offender's history.
- No alternatives to prison available.
- Offender needs long-term substance abuse treatment available only through the Department of Corrections.
- Deserves greater punishment considering injury to victim.

### Less severe

- The worksheets exaggerate the severity of the offender's prior history.
- The recommended sentence punishes too harshly or too leniently.
- Offender shows sufficient progress toward rehabilitation to allow alternative to prison.

## Property Prison Sentence Length Worksheet

2 **1** Defendant \_\_\_\_\_ Case No. \_\_\_\_\_

3 **Most Serious Conviction Offense** \_\_\_\_\_

Unauthorized Use/B&E Vehicle .....	32	Theft of Prop II, Receive Stolen Prop II .....	46
Possession/Use Credit/Debit Card .....	39	Theft of Prop I, Receive Stolen Prop I .....	58
Possession Forged Instrument II .....	42	Burglary II .....	70
Forgery II .....	44	Burglary I .....	275
Burglary III .....	45		

Score

4 **Number of Additional Felony Convictions (Including Counts)** \_\_\_\_\_

None .....	0
1 .....	5
2 .....	10
3 or more .....	15

Score

5 **Number of Prior Adult Felony Convictions** \_\_\_\_\_

None .....	0	6 .....	72
1 .....	12	7 .....	84
2 .....	24	8 .....	97
3 .....	36	9 .....	109
4 .....	48	10 or more .....	121
5 .....	60		

Score

6 **Number of Prior Adult Felony Property Convictions** \_\_\_\_\_

None .....	0
1 .....	7
2 .....	14
3 .....	21
4 .....	27
5 or more .....	34

Score

7 **Prior Incarceration with Sentence Imposed of 1 Year or More** \_\_\_\_\_

If Yes .....	15
--------------	----

Score

8 **Prior Probation or Parole Revocation** \_\_\_\_\_

If Yes .....	7
--------------	---

Score

9 **Possession/Use of a Deadly Weapon/Dangerous Instrument or Injury to Victim** \_\_\_\_\_

If Yes .....	37
--------------	----

Score

10 **Acquired a Firearm During Offense** \_\_\_\_\_

If Yes .....	12
--------------	----

Score

See Prison Sentence Length  
Recommendation Table

11 **Total Score**

12 Recommended Sentence Range \_\_\_\_ to \_\_\_\_ (straight) \_\_\_\_ to \_\_\_\_ (split)

13 Actual Sentence Imposed \_\_\_\_\_

14 Reason did **not** accept sentence length recommendation \_\_\_\_\_



## Property Prison Sentence Length Ranges for Worksheet

Time in Months

<u>Score</u>	<u>Total Sentence</u>			<u>Time to Serve On Split</u>		
	<u>Low</u>	<u>Mid</u>	<u>High</u>	<u>Low</u>	<u>Mid</u>	<u>High</u>
32	13	18	23	6	9	12
37	13	22	31	6	9	12
39	13	22	31	6	9	12
42	13	22	31	6	9	12
44	13	22	31	6	9	12
45	13	22	31	6	9	12
46	13	22	31	6	9	12
47	13	22	31	6	9	12
49	14	23	31	6	9	12
51	14	23	31	6	9	12
52	14	27	38	6	9	12
53	14	27	38	6	9	12
54	14	27	38	6	9	12
55	14	27	38	6	9	12
56	14	31	46	6	9	12
57	14	31	46	6	9	12
58	14	31	46	6	9	12
59	14	31	46	6	9	12
60	14	31	46	6	9	12
61	16	31	46	6	9	12
62	16	31	46	6	9	12
63	16	31	46	6	9	12
64	16	31	46	6	9	12
65	16	31	46	6	9	12
66	16	31	46	6	9	12
67	16	31	46	6	9	12
68	16	31	46	6	9	12
69	16	31	46	6	9	12
70	16	31	46	6	9	12
71	19	32	46	6	9	12
72	19	32	46	6	9	12
73	19	32	46	6	9	12
74	19	32	46	6	9	12
75	19	32	46	6	9	12
76	19	36	54	6	9	12
77	19	36	54	6	9	12
78	22	42	61	6	9	12
79	22	42	61	6	9	12
80	22	42	61	6	9	12
81	22	42	61	6	9	12
82	22	42	61	6	9	12
83	22	42	61	6	9	12
84	22	42	61	6	9	12
85	22	42	61	6	9	12
86	22	42	61	6	9	12
87	22	42	61	6	9	12
88	22	42	61	6	9	12



<b>Score</b>	<b>Total Sentence</b>			<b>Time to Serve On Split</b>		
	<b><u>Low</u></b>	<b><u>Mid</u></b>	<b><u>High</u></b>	<b><u>Low</u></b>	<b><u>Mid</u></b>	<b><u>High</u></b>
<b>89</b>	22	42	61	6	12	19
<b>90</b>	22	45	69	6	12	19
<b>91</b>	22	45	69	6	12	19
<b>92</b>	22	45	69	6	12	19
<b>93</b>	22	45	69	6	12	19
<b>94</b>	22	45	69	6	12	19
<b>95</b>	22	45	69	6	12	19
<b>96</b>	22	45	69	6	12	19
<b>97</b>	22	45	69	6	12	19
<b>98</b>	22	45	69	6	12	19
<b>99</b>	22	49	77	6	12	19
<b>100</b>	22	49	77	6	12	19
<b>101</b>	22	68	115	6	12	19
<b>102</b>	22	68	115	6	12	19
<b>103</b>	22	68	115	6	12	19
<b>104</b>	22	68	115	6	12	19
<b>105</b>	22	68	115	6	12	19
<b>106</b>	24	70	115	6	12	19
<b>107</b>	27	71	115	6	12	19
<b>108</b>	27	71	115	6	12	19
<b>109</b>	27	71	115	6	12	19
<b>110</b>	27	71	115	6	12	19
<b>111</b>	27	71	115	6	12	19
<b>112</b>	27	71	115	6	12	19
<b>113</b>	27	71	115	6	12	19
<b>114</b>	27	71	115	6	12	19
<b>115</b>	27	71	115	6	12	19
<b>116</b>	27	71	115	6	12	19
<b>117</b>	27	71	115	6	12	19
<b>118</b>	32	74	115	6	12	19
<b>119</b>	54	85	115	6	12	19
<b>120</b>	54	85	115	6	12	19
<b>121</b>	54	85	115	6	12	19
<b>122</b>	54	85	115	6	12	19
<b>123</b>	54	85	115	6	12	19
<b>124</b>	54	85	115	6	12	19
<b>125</b>	54	85	115	6	12	19
<b>126</b>	54	85	115	6	12	19
<b>127</b>	54	85	115	6	12	19
<b>128</b>	54	85	115	6	12	19
<b>129</b>	54	85	115	6	12	19
<b>130</b>	54	85	115	6	12	19
<b>131</b>	54	85	115	6	12	19
<b>132</b>	54	85	115	6	12	19
<b>133</b>	54	85	115	6	12	19
<b>134</b>	54	85	115	6	12	19
<b>135</b>	54	85	115	6	12	19
<b>136</b>	54	85	115	6	12	19
<b>137</b>	54	85	115	6	12	19
<b>138</b>	54	85	115	6	12	19

<b>Score</b>	<b>Total Sentence</b>			<b>Time to Serve On Split</b>		
	<b><u>Low</u></b>	<b><u>Mid</u></b>	<b><u>High</u></b>	<b><u>Low</u></b>	<b><u>Mid</u></b>	<b><u>High</u></b>
<b>139</b>	54	85	115	6	12	19
<b>140</b>	54	85	115	6	12	19
<b>141</b>	54	85	115	6	12	19
<b>142</b>	54	85	115	6	12	19
<b>143</b>	54	85	115	6	12	19
<b>144</b>	76	95	115	6	12	19
<b>145</b>	76	95	115	6	12	19
<b>146</b>	76	95	115	6	12	19
<b>147</b>	76	95	115	6	12	19
<b>148</b>	76	95	115	6	12	19
<b>149</b>	76	95	115	6	12	19
<b>150</b>	76	95	115	6	12	19
<b>151</b>	76	95	115	12	15	19
<b>152</b>	76	95	115	12	15	19
<b>153</b>	76	95	115	12	15	19
<b>154</b>	76	95	115	12	15	19
<b>155</b>	76	95	115	12	15	19
<b>156</b>	76	95	115	12	15	19
<b>157</b>	76	95	115	12	15	19
<b>158</b>	76	95	115	12	15	19
<b>159</b>	76	95	115	12	15	19
<b>160</b>	76	95	115	12	15	19
<b>161</b>	76	95	115	12	15	19
<b>162</b>	76	95	115	12	15	19
<b>163</b>	76	95	115	12	15	19
<b>164</b>	76	95	115	12	15	19
<b>165</b>	76	95	115	12	15	19
<b>166</b>	76	95	115	12	15	19
<b>167</b>	76	95	115	12	15	19
<b>168</b>	81	102	123	12	15	19
<b>169</b>	81	102	123	12	15	19
<b>170</b>	81	102	123	12	18	25
<b>171</b>	81	102	123	12	18	25
<b>172</b>	81	102	123	12	18	25
<b>173</b>	81	102	123	12	18	25
<b>174</b>	81	102	123	12	18	25
<b>175</b>	81	102	123	12	18	25
<b>176</b>	81	102	123	12	18	25
<b>177</b>	81	102	123	12	18	25
<b>178</b>	81	102	123	12	18	25
<b>179</b>	81	102	123	12	18	25
<b>180</b>	81	102	123	12	18	25
<b>181</b>	81	102	123	12	18	25
<b>182</b>	81	102	123	12	18	25
<b>183</b>	81	102	123	12	18	25
<b>184</b>	81	102	123	12	18	25
<b>185</b>	81	102	123	12	18	25
<b>186</b>	81	102	123	12	18	25
<b>187</b>	81	102	123	12	18	25
<b>188</b>	81	102	123	12	18	25

<b>Score</b>	<b>Total Sentence</b>			<b>Time to Serve On Split</b>		
	<b><u>Low</u></b>	<b><u>Mid</u></b>	<b><u>High</u></b>	<b><u>Low</u></b>	<b><u>Mid</u></b>	<b><u>High</u></b>
<b>189</b>	81	102	123	12	18	25
<b>190</b>	81	102	123	12	18	25
<b>191</b>	81	102	123	12	18	25
<b>192</b>	81	117	154	12	18	25
<b>195</b>	81	117	154	12	18	25
<b>197</b>	81	117	154	12	18	25
<b>198</b>	81	117	154	12	18	25
<b>199</b>	81	117	154	12	18	25
<b>201</b>	81	117	154	12	18	25
<b>202</b>	81	117	154	12	18	25
<b>204</b>	81	117	154	12	18	25
<b>205</b>	81	117	154	12	18	25
<b>206</b>	81	117	154	12	22	31
<b>207</b>	81	117	154	12	22	31
<b>208</b>	81	117	154	12	22	31
<b>209</b>	81	117	154	12	22	31
<b>210</b>	81	117	154	12	22	31
<b>211</b>	81	117	154	12	22	31
<b>213</b>	81	117	154	12	22	31
<b>214</b>	81	117	154	12	22	31
<b>215</b>	81	117	154	18	25	31
<b>216</b>	81	117	154	18	25	31
<b>217</b>	81	117	154	18	25	31
<b>219</b>	81	117	154	18	25	31
<b>220</b>	81	117	154	18	25	31
<b>222</b>	81	117	154	18	25	31
<b>223</b>	81	117	154	18	25	31
<b>225</b>	81	117	154	18	25	31
<b>228</b>	81	117	154	18	25	31
<b>232</b>	81	117	154	18	25	31
<b>233</b>	81	117	154	18	25	31
<b>235</b>	81	117	154	18	25	31
<b>245</b>	81	117	154	18	25	31
<b>246</b>	81	117	154	18	25	31
<b>250</b>	81	117	154	18	25	31
<b>260</b>	81	117	154	18	25	31
<b>274</b>	81	117	154	18	25	31
<b>275</b>	120	135	156	24	30	36
<b>280</b>	120	135	156	24	30	36
<b>282</b>	120	135	156	24	30	36
<b>285</b>	120	135	156	24	30	36
<b>287</b>	120	135	156	24	30	36
<b>290</b>	120	135	156	24	30	36
<b>292</b>	120	135	156	24	30	36
<b>294</b>	120	135	156	24	30	36
<b>299</b>	120	135	156	24	30	36
<b>302</b>	120	135	156	24	30	36
<b>304</b>	120	135	156	24	30	36
<b>306</b>	120	135	156	24	30	36
<b>308</b>	120	135	156	24	30	36

<b>Score</b>	<b>Total Sentence</b>			<b>Time to Serve On Split</b>		
	<b><u>Low</u></b>	<b><u>Mid</u></b>	<b><u>High</u></b>	<b><u>Low</u></b>	<b><u>Mid</u></b>	<b><u>High</u></b>
<b>309</b>	120	135	156	24	30	36
<b>311</b>	120	135	156	24	30	36
<b>312</b>	120	135	156	24	30	36
<b>313</b>	120	135	156	24	30	36
<b>314</b>	120	135	156	24	30	36
<b>317</b>	120	135	156	24	30	36
<b>318</b>	120	150	180	24	30	36
<b>320</b>	120	150	180	24	30	36
<b>321</b>	120	150	180	24	30	36
<b>323</b>	120	150	180	24	30	36
<b>324</b>	120	150	180	24	30	36
<b>326</b>	120	150	180	24	30	36
<b>329</b>	120	150	180	24	30	36
<b>331</b>	120	150	180	24	30	36
<b>333</b>	120	150	180	24	30	36
<b>335</b>	120	150	180	24	30	36
<b>336</b>	120	150	180	24	30	36
<b>338</b>	120	150	180	24	30	36
<b>339</b>	120	150	180	24	30	36
<b>341</b>	120	150	180	24	30	36
<b>342</b>	120	150	180	24	30	36
<b>343</b>	120	150	180	24	30	36
<b>345</b>	120	150	180	24	30	36
<b>347</b>	120	150	180	24	30	36
<b>350</b>	120	150	180	24	30	36
<b>351</b>	120	150	180	24	30	36
<b>353</b>	144	192	240	36	48	60
<b>356</b>	144	192	240	36	48	60
<b>358</b>	144	192	240	36	48	60
<b>359</b>	144	192	240	36	48	60
<b>362</b>	144	192	240	36	48	60
<b>363</b>	144	192	240	36	48	60
<b>364</b>	144	192	240	36	48	60
<b>369</b>	144	192	240	36	48	60
<b>370</b>	144	192	240	36	48	60
<b>375</b>	144	192	240	36	48	60
<b>380</b>	144	192	240	36	48	60
<b>382</b>	144	192	240	36	48	60
<b>385</b>	144	192	240	36	48	60
<b>396</b>	144	192	240	36	48	60
<b>404</b>	144	192	240	36	48	60
<b>418</b>	144	192	240	36	48	60



## **Voluntary Sentencing Standards & Worksheets**

The Personal offenses listed below are covered by the Voluntary Sentencing Standards & Worksheets.

### **Most Serious Offense at Conviction Ranking**

Murder – 728 points  
§13A-6-2

Rape I – 386 points  
§13A-6-61

Robbery I – 374 points  
§13A-8-41

Manslaughter – 238 points  
§13A-6-3

Sodomy I – 235 points  
§13A-6-63

Robbery II – 173 points  
§13A-8-42

Assault I – 148 points  
§13A-6-20

Rape II – 129 points  
§13A-6-62

Robbery III – 89 points  
§13A-8-43

Sodomy II – 81 points  
§13A-6-64

Assault II – 72 points  
§13A-6-21

# INSTRUCTIONS - - Personal Prison In/Out Worksheet

**1 Case Information Section**  
Complete prior to sentencing. See the General Instructions to complete this section.

**2 Sentencing Factors Section**  
Complete prior to sentencing.

**3 Most Serious Conviction Offense –**  
Following the general instructions, the scorer should select only the most serious offense being sentenced at the current sentencing event. Where two or more offenses have the same score, circle the specific offense scored as the most serious conviction offense on this worksheet. The scorer should enter the number of points assigned to the most serious offense.  
*Note: Rape I or II or Sodomy I or II is not a worksheet offense if the victim of the offense is under the age of 12 years old.*

**4 Number of Prior Adult Felony Convictions -** Count all felony convictions that occurred prior to the arrest date(s) of the offense(s) being sentenced at the current sentencing event.

**5 Prior Incarceration with Sentence Imposed of 1 Year or More -** Count prior prison, jail or Department of Corrections/ community corrections sentences where the non-suspended time imposed was one year or greater. Count only sentences that occurred prior to the arrest date(s) of the offense(s) being sentenced.

**6 Number of Prior Juvenile Delinquency or Youthful Offender Adjudications (Violation/Misdemeanor/Felony) -**  
Count all juvenile delinquency and Youthful Offender adjudications that occurred prior to the arrest date(s) of the offense(s) being sentenced at the current sentencing event. *Note: use the definition for misdemeanors or violations as set out in the General Instructions.*

**7 Possession/Use of Deadly Weapon or Dangerous Instrument–** Count this if the offender used or brandished a deadly weapon or dangerous instrument. This factor should not be counted if the deadly weapon or dangerous instrument is merely “loot” or proceeds of a sale. There should be a connection other than the mere possession of the deadly weapon or dangerous instrument for this factor to be scored. For the purpose of completing the worksheets, a deadly weapon or dangerous instrument shall be defined pursuant to Sections 13A-1-2 and 13A-11-72, Code of Alabama 1975.-Additionally,

this factor should be counted if the defendant enters a dwelling with a deadly weapon whether or not it was used or brandished during the commission of the offense.

**8 Recommendation Section**  
**Total Score –** Prior to sentencing, total the scores from the Sentencing Factors Section. If the total score is 1 through 7 points, then a non-prison sentence is recommended for the offender. If the total score is 8 or more points, a prison sentence is recommended.

**9 Non-Prison: 1-7 Points** Several options are given for imposing a non-prison sentence. Some of these options are shown on the worksheet. One of these options must be checked to complete the worksheet. Check only one option. *Probation* should be checked if the offender is sentenced to traditional probation.  
*Community Corrections Probation* should be checked if the offender is sentenced to community corrections as a condition of probation.  
*County Jail/Work Release* should be checked if the offender is sentenced to a term in the county jail. *Note: For worksheet purposes, a sentence to the county jail and/or county work release is considered a non-prison sentence.*  
*Other Alternative* should be checked when a non-prison alternative, other than those listed, is used.  
*The sentence disposition type should be checked even if it is not consistent with the recommended disposition. This information will be useful for possible modification of the worksheet recommendations.*

**10 Prison: 8 or more points** Several prison alternatives are provided. *Department of Corrections* should be checked if the sentence is a straight prison sentence.  
*DOC at Community Corrections* should be checked if the offender is sentenced to DOC and ordered to a community corrections program.  
*DOC Split Sentence* should be checked if the sentence is a split sentence. Any split to be served in DOC or DOC Community Corrections is considered a prison sentence.  
*The sentence disposition type should be checked even if it is not consistent with the recommended disposition. This information will be useful for possible*

*modification of the worksheet recommendations.*

**11 Reason Recommendation Not Accepted**

This section need be completed only on the copy of the worksheet provided to the court clerk. If the sentencing judge decides that the In/Out recommendation does not fit this case, the judge or another person designated by the judge, is asked to give a reason why the recommendation was not followed. The reason given should be stated here and will be used by the Sentencing Commission to evaluate the effectiveness of the standards. Reasons may include but are not limited to the following:

More severe

- Worksheets do not express the severity of criminality of the offender’s history.
- No alternatives to prison available.
- Offender needs long-term substance abuse treatment available only through the Department of Corrections.
- Deserves greater punishment considering injury to victim.

Less severe

- The worksheets exaggerate the severity of the offender’s prior history.
- The recommended sentence punishes too harshly or too leniently.
- Offender shows sufficient progress toward rehabilitation to allow alternative to prison.

Please Print

# Personal Prison In/Out Worksheet

**1** Defendant \_\_\_\_\_  
Judge \_\_\_\_\_  
Probation Officer \_\_\_\_\_  
Worksheet Preparer, Title \_\_\_\_\_  
List Additional Cases Sentenced for this Event \_\_\_\_\_

Case No. \_\_\_\_\_  
DA/Asst. DA \_\_\_\_\_  
Defense Attorney \_\_\_\_\_

**2**

**3** Most Serious Conviction Offense

Please circle one offense

Assault II .....	1	Rape II, Sodomy II, Robbery II .....	5
Robbery III .....	3	Rape I, Sodomy I, Manslaughter, Robbery I .....	8
Assault I .....	4	Murder .....	10

Score

**4** Number of Prior Adult Felony Convictions

None .....	0
1 .....	2
2 .....	3
3 .....	5
4 .....	6
5 or more .....	8

Score

**5** Prior Incarceration with Sentence Imposed of 1 Year or More

If Yes ..... 1

Score

**6** Number of Prior Juvenile Delinquency or YO Adjudications (Violation/Misd/Felony)

None .....	0
1-2 .....	1
3-4 .....	2
5 or more .....	3

Score

**7** Possession/Use of Deadly Weapon or Dangerous Instrument

If Yes ..... 4

Score

## Recommendation

**8** Total Score

**9** 1-7 points: Non-Prison

Probation \_\_\_\_\_  
Community Corrections Probation \_\_\_\_\_  
County Jail/Work Release \_\_\_\_\_  
Other Alternative \_\_\_\_\_

**10** 8 or more points: Prison

Department of Corrections \_\_\_\_\_  
DOC at Community Corrections \_\_\_\_\_  
DOC Split Sentence \_\_\_\_\_

**11** Reason Recommendation Not Accepted \_\_\_\_\_



# INSTRUCTIONS - - Personal Prison Sentence Length Worksheet

The Personal Prison Sentence Length Worksheet is intended for use where a prison sentence is recommended on the In/Out worksheet. The sentencing standards were developed based on prison sentences actually imposed. These sentences may, however, be used as a guide when the recommendation is non-prison so long as other laws regarding limits on the length of probation are followed.

The Case Information and Sentencing Factors section of this worksheet must be completed prior to sentencing.

## 1 Case Information Section

Enter the Defendant's name and Case Number even if it has already been entered on the In/Out worksheet.

## 2 Sentencing Factors Section

Complete prior to sentencing.

## 3 Most Serious Conviction Offense - The scorer should select only the most serious offense being sentenced at the current sentencing event. (See General Instructions.)

## 4 Number of Prior Adult Felony Convictions - Count all felony convictions that occurred prior to the arrest date(s) of the offense(s) being sentenced at the current sentencing event.

## 5 Number of Prior Incarcerations with Sentence Imposed of 1 Year or More - Count prior prison, jail or Department of Corrections/community corrections sentences where the non-suspended time imposed was one year or greater. Count only sentences that occurred prior to the arrest date(s) of the offense(s) being sentenced.

## 6 Prior Incarceration with Sentence Imposed of Less Than 1 Year - Count prior prison, jail or Department of Corrections/community corrections sentences where the non-suspended time imposed was less than one year. Count only sentences that occurred prior to the arrest date(s) of the offense(s) being sentenced.

## Prison Sentence Length Recommendation

## 7 Total Score - Total the scores from the Sentencing Factors Section.

## 8 Recommended Sentence Range - Go to the Drug Prison Sentence Ranges for Worksheet Table to convert the score into

a sentence length recommendation. Record the recommended sentence range for the total sentence in the space identified as "straight". Record the recommended split sentence range in the space provided. The prison sentence for the most serious offense must come from these tables to comply with the standards. Statutory enhancements, as they have been applied, have been factored into the sentence length table recommendations and should *not* be added.

## 9 Actual Sentence Imposed - Enter the actual sentence imposed, including the split if a split is imposed.

*Example:* 36 months, split to serve 12 months with 24 months probation.

*Example:* 60 months, split to serve 24 months with 12 months probation.

*Example:* 60 months

*Note: the disposition of the prison sentence, DOC custody, DOC at Community Corrections, or DOC split should also be checked on the In/Out worksheet.*

## 10 Reason Recommendation Not Accepted - If the sentencing judge decides that no sentence length recommendation fits this case, the judge or another person designated by the judge, is asked to give a reason why the recommendation was not followed. The reason given should be stated here and will be used by the Sentencing Commission to evaluate the effectiveness of the standards. Reasons may include but are not limited to the following:

More severe

- Worksheets do not express the severity of criminality of the offender's history.
- No alternatives to prison available.
- Offender needs long-term substance abuse treatment available only through the Department of Corrections.
- Deserves greater punishment considering injury to victim.

Less severe

- The worksheets exaggerate the severity of the offender's prior history.
- The recommended sentence punishes too harshly or too leniently.

- Offender shows sufficient progress toward rehabilitation to allow alternative to prison.

After sentencing, the completed worksheet must be given to the court clerk to forward to the Alabama Sentencing Commission, along with the Prison In/Out worksheet.

Please Print **Personal Prison Sentence Length Worksheet**

**2** **1** Defendant \_\_\_\_\_ Case No. \_\_\_\_\_

**3** **Most Serious Conviction Offense** \_\_\_\_\_

Assault II .....	72	Sodomy I .....	235
Sodomy II .....	81	Manslaughter .....	238
Robbery III .....	89	Robbery I .....	374
Rape II .....	129	Rape I .....	386
Assault I .....	148	Murder .....	728
Robbery II .....	173		

Score

**4** **Number of Prior Adult Felony Convictions** \_\_\_\_\_

None .....	0
1 .....	19
2 .....	37
3 .....	56
4 .....	75
5 .....	93
6 .....	112
7 .....	130
8 .....	149
9 .....	168
10 or more .....	186

Score

**5** **Number of Prior Incarcerations with Sentence Imposed of 1 Year or More** \_\_\_\_\_

None .....	0
1 .....	51
2 .....	101
3 .....	152
4 .....	202
5 or more .....	253

Score

**6** **Prior Incarceration with Sentence Imposed of Less Than 1 Year** \_\_\_\_\_

If Yes ..... 33

Score

**See Prison Sentence Length  
Recommendation Table**

**7** **Total Score**

**8** Recommended Sentence Range \_\_\_\_\_ to \_\_\_\_\_ (straight) \_\_\_\_\_ to \_\_\_\_\_ (split)

**9** Actual Sentence Imposed \_\_\_\_\_

**10** Reason did **not** accept sentence length recommendation \_\_\_\_\_



## Personal Prison Sentence Length Ranges for Worksheet

Time in Months

<u>Score</u>	<u>Total Sentence</u>			<u>Time to Serve On Split</u>		
	<u>Low</u>	<u>Mid</u>	<u>High</u>	<u>Low</u>	<u>Mid</u>	<u>High</u>
72	13	37	60	6	15	24
81	13	37	60	6	15	24
89	13	37	60	6	15	24
91	13	37	60	6	15	24
100	13	37	60	3	14	24
105	13	47	80	6	15	24
108	13	47	80	6	15	24
109	13	47	80	6	15	24
122	13	47	80	6	15	24
123	13	47	80	6	15	24
124	13	47	80	6	15	24
126	13	47	80	6	15	24
128	13	47	80	6	15	24
129	39	71	102	6	15	24
132	47	74	102	12	18	24
133	47	74	102	12	18	24
137	47	74	102	12	18	24
141	55	78	102	12	18	24
142	55	99	143	12	24	36
145	55	99	143	12	24	36
147	55	99	143	12	24	36
148	55	99	143	12	24	36
156	55	99	143	12	24	36
159	62	103	143	12	24	36
160	62	103	143	12	24	36
162	62	103	143	12	24	36
164	62	103	143	12	24	36
166	62	108	153	12	24	36
167	78	116	153	12	24	36
169	78	116	153	12	24	36
170	78	116	153	12	24	36
173	78	116	153	12	24	36
175	78	116	153	12	24	36
177	78	116	153	12	24	36
178	78	116	153	12	24	36
179	78	116	153	12	24	36
180	78	116	153	12	24	36
181	78	116	153	12	24	36
182	78	116	153	12	24	36
184	78	116	153	12	24	36
185	78	116	153	12	24	36
192	78	126	173	12	24	36
193	78	126	173	12	24	36
196	78	126	173	12	24	36
197	78	126	173	12	24	36
198	78	126	173	12	24	36
199	78	126	173	12	24	36
200	78	126	173	12	24	36
201	78	126	173	12	24	36

<u>Score</u>	<b>Total Sentence</b>			<b>Time to Serve On Split</b>		
	<u>Low</u>	<u>Mid</u>	<u>High</u>	<u>Low</u>	<u>Mid</u>	<u>High</u>
204	78	126	173	12	24	36
206	78	126	173	12	24	36
209	78	126	173	12	24	36
210	78	126	173	12	24	36
215	78	126	173	12	24	36
217	78	126	173	12	24	36
218	78	126	173	12	24	36
219	78	126	173	12	24	36
223	78	126	173	12	24	36
224	78	126	173	12	24	36
225	78	126	173	12	24	36
227	78	126	173	12	24	36
229	78	126	173	12	24	36
230	78	126	173	12	24	36
231	78	126	173	12	24	36
232	78	126	173	18	29	40
233	78	126	173	18	29	40
235	78	126	173	18	29	40
236	78	126	173	18	33	48
237	78	126	173	18	33	48
238	78	126	173	18	33	48
243	78	126	173	18	33	48
248	78	141	204	18	33	48
249	78	141	204	18	33	48
251	78	141	204	18	33	48
252	78	141	204	18	33	48
253	78	141	204	18	33	48
254	86	145	204	18	33	48
255	86	145	204	18	33	48
256	86	145	204	18	33	48
257	86	145	204	18	33	48
260	86	145	204	18	33	48
261	86	145	204	18	33	48
262	86	145	204	18	33	48
265	86	145	204	18	33	48
266	86	145	204	18	33	48
267	86	145	204	18	33	48
268	86	145	204	18	33	48
269	86	145	204	18	33	48
271	86	145	204	18	33	48
272	86	145	204	18	33	48
274	86	145	204	18	33	48
275	86	145	204	18	33	48
276	86	145	204	18	33	48
280	86	145	204	18	33	48
281	86	145	204	18	33	48
283	101	153	204	18	33	48
286	101	153	204	18	33	48
287	101	153	204	18	33	48
288	101	153	204	18	33	48
289	101	153	204	18	33	48
290	101	153	204	18	33	48
291	101	153	204	18	33	48

<u>Score</u>	<b>Total Sentence</b>			<b>Time to Serve On Split</b>		
	<u>Low</u>	<u>Mid</u>	<u>High</u>	<u>Low</u>	<u>Mid</u>	<u>High</u>
292	101	153	204	18	33	48
294	101	153	204	18	33	48
299	101	153	204	18	33	48
300	101	153	204	18	33	48
305	101	153	204	18	33	48
307	101	153	204	18	33	48
308	101	153	204	18	33	48
311	101	153	204	22	41	60
313	101	153	204	22	41	60
316	101	153	204	22	41	60
317	101	153	204	22	41	60
319	101	153	204	22	41	60
322	101	153	204	22	41	60
323	101	153	204	22	41	60
324	101	153	204	22	41	60
326	117	161	204	22	41	60
330	117	161	204	22	41	60
331	117	161	204	22	41	60
332	117	161	204	22	41	60
334	117	161	204	22	41	60
335	117	161	204	22	41	60
336	117	161	204	22	41	60
337	117	161	204	22	41	60
338	117	161	204	22	41	60
339	117	161	204	24	42	60
342	117	161	204	24	42	60
344	117	161	204	24	42	60
345	117	161	204	24	42	60
349	117	161	204	24	42	60
350	117	161	204	24	42	60
355	117	161	204	24	42	60
356	117	161	204	24	42	60
358	117	161	204	24	42	60
359	117	161	204	24	42	60
362	117	161	204	24	42	60
363	117	161	204	24	42	60
364	117	161	204	24	42	60
366	117	161	204	24	42	60
367	117	161	204	24	42	60
371	117	186	255	24	42	60
373	117	186	255	24	42	60
374	117	186	255	24	42	60
375	117	186	255	24	42	60
376	117	186	255	24	42	60
378	117	186	255	24	42	60
379	117	186	255	24	42	60
381	117	186	255	24	42	60
386	117	186	255	24	42	60
387	117	186	255	24	42	60
389	117	186	255	24	42	60
393	117	186	255	24	42	60
400	117	186	255	24	42	60
403	117	186	255	24	42	60

<u>Score</u>	<b>Total Sentence</b>			<b>Time to Serve On Split</b>		
	<u>Low</u>	<u>Mid</u>	<u>High</u>	<u>Low</u>	<u>Mid</u>	<u>High</u>
404	117	186	255	24	42	60
405	117	186	255	24	42	60
406	117	186	255	24	42	60
407	117	186	255	24	42	60
409	117	186	255	24	42	60
411	117	186	255	24	42	60
412	117	186	255	24	42	60
414	117	186	255	24	42	60
418	117	186	255	24	42	60
419	117	186	255	24	42	60
423	117	186	255	24	42	60
425	117	186	255	24	42	60
426	117	186	255	24	42	60
427	117	186	255	24	42	60
428	117	186	255	24	42	60
430	117	186	255	24	42	60
431	117	186	255	24	42	60
436	117	186	255	24	42	60
437	117	186	255	24	42	60
438	156	231	306	24	42	60
439	156	231	306	24	42	60
442	156	231	306	24	42	60
444	156	231	306	24	42	60
449	156	231	306	24	42	60
450	156	231	306	24	42	60
451	156	231	306	36	48	60
455	156	231	306	36	48	60
456	156	231	306	36	48	60
457	156	231	306	36	48	60
458	156	231	306	36	48	60
460	156	231	306	36	48	60
461	156	282	408	36	48	60
462	156	282	408	36	48	60
463	156	282	408	36	48	60
465	156	282	408	36	48	60
467	156	282	408	36	48	60
470	156	282	408	36	48	60
474	156	282	408	36	48	60
475	156	282	408	36	48	60
476	156	282	408	36	48	60
477	156	282	408	36	48	60
483	156	282	408	36	48	60
487	156	282	408	36	48	60
491	156	282	408	36	48	60
493	156	282	408	36	48	60
494	156	282	408	36	48	60
495	156	282	408	36	48	60
498	156	282	408	36	48	60
500	156	282	408	36	48	60
501	156	282	408	36	48	60
505	156	282	408	36	48	60
506	156	588	1020	36	48	60
507	156	588	1020	36	48	60

<b>Score</b>	<b>Total Sentence</b>			<b>Time to Serve On Split</b>		
	<b><u>Low</u></b>	<b><u>Mid</u></b>	<b><u>High</u></b>	<b><u>Low</u></b>	<b><u>Mid</u></b>	<b><u>High</u></b>
<b>510</b>	156	588	1020	36	48	60
<b>512</b>	156	588	1020	36	48	60
<b>513</b>	156	588	1020	36	48	60
<b>520</b>	156	588	1020	36	48	60
<b>524</b>	156	588	1020	36	48	60
<b>526</b>	156	588	1020	36	48	60
<b>528</b>	156	588	1020	36	48	60
<b>529</b>	156	588	1020	36	48	60
<b>530</b>	156	588	1020	36	48	60
<b>531</b>	156	588	1020	36	48	60
<b>533</b>	156	588	1020	36	48	60
<b>540</b>	156	588	1020			
<b>543</b>	156	588	1020			
<b>544</b>	156	588	1020			
<b>545</b>	156	588	1020			
<b>548</b>	156	588	1020			
<b>550</b>	156	588	1020			
<b>551</b>	156	588	1020			
<b>552</b>	156	588	1020			
<b>553</b>	156	588	1020			
<b>556</b>	156	588	1020			
<b>558</b>	156	588	1020			
<b>562</b>	156	588	1020			
<b>564</b>	156	588	1020			
<b>582</b>	156	588	1020			
<b>590</b>	156	588	1020			
<b>594</b>	156	588	1020			
<b>595</b>	156	588	1020			
<b>601</b>	156	588	1020			
<b>602</b>	156	588	1020			
<b>607</b>	156	588	1020			
<b>619</b>	156	588	1020			
<b>620</b>	156	588	1020			
<b>627</b>	156	588	1020			
<b>632</b>	156	588	1020			
<b>652</b>	156	588	1020			
<b>665</b>	156	588	1020			
<b>676</b>	156	588	1020			
<b>677</b>	156	588	1020			
<b>684</b>	156	588	1020			
<b>688</b>	156	588	1020			
<b>695</b>	156	588	1020			
<b>701</b>	156	588	1020			
<b>706</b>	156	588	1020			
<b>709</b>	156	588	1020			
<b>710</b>	156	588	1020			
<b>728</b>	156	588	1020			
<b>732</b>	156	588	1020			
<b>735</b>	234	627	1020			
<b>747</b>	234	627	1020			
<b>757</b>	234	627	1020			
<b>761</b>	234	627	1020			
<b>765</b>	234	627	1020			



<u>Score</u>	<b>Total Sentence</b>			<b>Time to Serve On Split</b>		
	<u>Low</u>	<u>Mid</u>	<u>High</u>	<u>Low</u>	<u>Mid</u>	<u>High</u>
<b>780</b>	234	627	1020			
<b>784</b>	234	627	1020			
<b>790</b>	234	627	1020			
<b>798</b>	234	627	1020			
<b>803</b>	234	627	1020			
<b>812</b>	234	627	1020			
<b>816</b>	234	627	1020			
<b>817</b>	234	627	1020			
<b>831</b>	234	627	1020			
<b>835</b>	234	627	1020			
<b>836</b>	234	627	1020			
<b>840</b>	234	627	1020			
<b>848</b>	234	627	1020			
<b>849</b>	234	627	1020			
<b>854</b>	234	627	1020			
<b>868</b>	234	627	1020			
<b>872</b>	234	627	1020			
<b>885</b>	234	627	1020			
<b>904</b>	234	627	1020			
<b>905</b>	234	627	1020			
<b>918</b>	234	627	1020			
<b>936</b>	234	627	1020			
<b>950</b>	234	627	1020			
<b>955</b>	234	627	1020			
<b>986</b>	234	627	1020			
<b>1010</b>	234	627	1020			
<b>1111</b>	234	627	1020			
<b>1126</b>	234	627	1020			
<b>1130</b>	234	627	1020			

**DRAFT COPY****EXPLANATION OF RIGHTS AND  
PLEA OF GUILTY**

Case Number \_\_\_\_\_

Form CR-51 (front) Rev. 6/07

(Non-Habitual Offender – Felony and Misdemeanor – Circuit or District Court)  
(FOR OFFENSES COMMITTED ON OR AFTER JUNE 1, 2006)

IN THE \_\_\_\_\_ COURT OF \_\_\_\_\_, ALABAMA  
(Circuit or District) (Name of County)  
STATE OF ALABAMA v. \_\_\_\_\_  
Defendant

**TO THE ABOVE-NAMED DEFENDANT:** The Court, having been informed that you wish to enter a plea of guilty in this case, hereby informs you of your rights as a defendant charged with a criminal offense.

**PENALTIES APPLICABLE TO YOUR CASE**

You are charged with the crime of \_\_\_\_\_, which is a Class \_\_\_\_ ☐ Felony ☐ Misdemeanor. The Court has been informed that you desire to enter a plea of guilty to ☐ this offense or ☐ to the crime of \_\_\_\_\_ which is a ☐ felony ☐ misdemeanor offense. The sentencing range for the above crime(s) is set out below:

MISDEMEANOR		FELONY	
<b>Class A</b>	Up to one (1) year imprisonment in the county jail, or a fine up to \$6,000, or both.	<b>Class A</b>	Not less than ten (10) years and not more than life or ninety-nine (99) years imprisonment in the state penitentiary, and may include a fine not to exceed \$60,000.
<b>Class B</b>	Up to six (6) months imprisonment in the county jail, or a fine up to \$3,000, or both.	<b>Class B</b>	Not less than two (2) years and not more than twenty (20) years imprisonment in the state penitentiary, and may include a fine not to exceed \$30,000.
<b>Class C</b>	Up to three (3) months imprisonment in the county jail, or a fine not to exceed \$500, or both.	<b>Class C</b>	Not less than one (1) year and one (1) day and not more than ten (10) years imprisonment in the state penitentiary, and may include a fine not to exceed \$15,000.

**Crime Victim's Assessment:** You will also be ordered to pay an additional monetary penalty for the use and benefit of the Alabama Crime Victims Compensation Commission of not less than \$50 and not more than \$10,000 for each felony and not less than \$25 and not more than \$1,000 for each misdemeanor for which you are convicted.

**This crime is also subject to the following enhancements or additional penalties as provided by law:** (Provisions Checked Apply To Your Case)

- ☐ **Enhanced Punishment For Use Of Firearm Or Deadly Weapon:** Sections 13A-5-6 (a) (4) and ((a) (5), Ala. Code 1975, provide for the enhancement of a punishment for a Class A, B, or C, felony in which a "firearm or deadly weapon was used or attempted to be used in the commission of the felony." This section provides for the following punishments in such events: For the commission of a Class A Felony, a term of imprisonment of not less than 20 years; For the commission of a Class B or C Felony, a term of imprisonment of not less than 10 years.
- ☐ **Enhanced Punishment for a Felony Criminal Sex Offense Involving a Child.** Sections 13A-5-6 (a) (4) and (a) (5), Ala. Code 1975, provide for the enhancement of a punishment for a Class A or B felony criminal sex offense involving a child under the age of 12 or involving child pornography. These Sections provide for the following punishment in such events: For a Class A felony criminal sex offense, not less than 20 years; For a Class B felony sex offense, not less than 10 years.
- ☐ **Enhanced Punishment for Drug Sale Near School:** Section 13A-12-250, Ala. Code 1975, provides that any person who is convicted of unlawfully selling any controlled substance within a three (3) mile radius of a public or private school, college, university or other educational institution, must be punished by an additional penalty of five years' imprisonment for each violation.
- ☐ **Enhanced Punishment for Drug Sale Near Housing Project:** Section 13A-12-270, Ala. Code 1975, provides that any person who is convicted of unlawfully selling any controlled substance within a three (3) mile radius of a public housing project owned by a housing authority must be punished by an additional penalty of five years' imprisonment in a state correctional facility for each violation.
- ☐ **Enhanced Punishment For Sales Of Controlled Substance To One Under the age of 18:** Section 13A-12-215, Ala. Code 1975, provides that anyone convicted of selling, furnishing or giving away a controlled substance to one who has not yet attained the age of 18 years, shall be guilty of a Class A Felony and the punishment imposed shall not be suspended or probation granted.
- ☐ **Drug Demand Reduction Assessment Act and Loss of Driving Privileges:** Section 13A-12-281 provides that any person convicted of a violation of Sections 13A-12-202, 13A-12-203, 13A-12-204, 13A-12-211, 13A-12-212, 13A-12-213, 13A-12-215 or 13A-12-231, Ala. Code 1975, shall be assessed an additional penalty of \$1,000 if he or she is a first-time offender or \$2,000 if he or she is a repeat offender under one of these sections. Collection of all or part of the penalty will be suspended if, with court approval, the defendant enters a drug rehabilitation program and if the defendant agrees to pay for a part or all of the program costs. Upon successful completion of the program, the defendant may apply to the court to reduce the penalty by the amount actually paid by him or her for participation in the program. Any suspension of the penalty can be withdrawn by the court if the defendant fails to enroll in or successfully pursue or otherwise fail to complete an approved program. In addition, pursuant to Section 13A-12-214 (unlawful possession of marijuana in the second degree), Section 32-5A-191(a)(3) or Section 32-5A 191(a)(4)(DUI offenses involving drugs), the defendant will lose his or her privilege to drive a motor vehicle for a period of six months, which shall be in addition to any suspension or revocation otherwise provided by law.
- ☐ **Alcohol/Drug Related Offenses:** A person convicted of an alcohol or drug-related offense, will be required to undergo an evaluation for substance abuse. Based upon the results of any such evaluation, he or she will be required to complete the recommended course of education and/or treatment and to pay for the evaluation and any program to which the defendant is referred. Failure to submit to an evaluation or failure to complete any program to which the defendant may be referred will be considered a violation of any probation or parole he or she may be granted. The defendant may also be required to attend monitoring sessions, including random drug and alcohol testing or blood, urine and/or breath tests and to pay a fee for this service. The defendant may request a waiver of part or all of the fees assessed if he or she is indigent or for any portion of time he or she is financially unable to pay. Community service may be ordered by the court in lieu of the monetary payment of fees by an indigent.

## EXPLANATION OF RIGHTS AND PLEA OF GUILTY

(Non-Habitual Offender – Felony and Misdemeanor – Circuit or District Court)

Form CR-51 (Back) Rev. 6/07

(For offenses committed on or after June 1, 2006)

- ☐ DNA Samples for Criminal Offenses in Section 36-18-24: Beginning May 6, 1994, Section 36-18-25(e), Ala. Code 1975, provides that, as of May 6, 1994, all persons convicted of any of the offenses set out in Section 36-18-24, shall be ordered by the court to submit to the taking of DNA samples.
- ☐ DUI Offenses: Beginning October 1, 1993, if any person is convicted of a DUI offense pursuant to Section 32-5A-191, Ala. Code 1975, an additional fine of \$1 00.00 will be assessed pursuant to Section 32-5A-191.1, Ala. Code 1975
- ☐ Drug Possession: Beginning October 1, 1995, if any person is convicted in any court of this state for drug possession, drug sale, drug trafficking, or drug paraphernalia offenses as defined in Section 13A-12-21 1 to 13A-12-260, inclusive, Ala. Code 1975, an additional fee of \$100.00 will be assessed pursuant to Section 36-18-7, Ala. Code 1975.
- ☐ Other: \_\_\_\_\_

**Initial Voluntary Sentencing Standards:** The Court has reviewed and considered the provisions of the Alabama Sentencing Reform Act of 2003, Sec. 12-25-30 thru 12-25-38, Code of Alabama, 1975. In the event the Court finds that this case is **NOT SUITABLE** for sentencing pursuant to those provisions, your sentence will fall within the imprisonment range specified above. However, should the Court find that this case **IS SUITABLE** for sentencing under the voluntary standards, you may be sentenced to probation, jail, community corrections or a period of incarceration. If you are sentenced to prison according to the sentencing standards recommendation, your sentence will be a sentence to incarceration within the range specified in the Prison Sentence Length Worksheet, which is a sentence to imprisonment from \_\_\_\_\_ months to \_\_\_\_\_ months. In no event will you be sentenced to imprisonment for less than 1 year and 1 day.

**RIGHTS YOU HAVE AND THE WAIVER OF YOUR RIGHTS**

Under the Constitution of the United States and the Constitution and laws of the State of Alabama, you have a right to remain silent and you may not be compelled to give evidence against yourself. Your attorney cannot disclose any confidential talks he/she has had with you. You do not have to answer any questions. If you do answer questions knowing that you have a right to remain silent, you will have waived this right.

You have the right to enter, or stand on if previously entered, a plea of "Not Guilty" or Not Guilty by Reason of Mental Disease or Defect," or "Not Guilty and Not Guilty by Reason of Mental Disease or Defect" and have a public trial before a duly selected jury. The jury would decide your guilt or innocence based upon the evidence presented before them. If you elect to proceed to trial, you would have the right to be present, you would have the right to have your attorney present to assist you, you would have the right to confront and cross examine your accuser(s) and all the State's witnesses, you would have the right to subpoena witnesses to testify on your behalf and to have their attendance in court and their testimony required by the court, and you would have the right to take the witness stand and to testify, but only if you chose to do so, as no one can require you to do this. If you elect to testify, you can be cross examined by the State just as any other witness is subjected to cross examination. If you elect not testify, no one but your attorney will be allowed to comment about that fact to the jury. Your attorney is bound to do everything he/she can honorably and reasonably do to see that you obtain a fair and impartial trial.

If you elect to proceed to trial, you come to court presumed to be innocent. This presumption of innocence will follow you throughout the trial until the State produces sufficient evidence to convince the jury (or the court if the trial is non-jury) of your guilt beyond a reasonable doubt. You have no burden of proof in this case. If the State fails to meet its burden, you would be found not guilty.

If you are entering a guilty plea to a charge for which you have not yet been indicted, you are waiving indictment by a grand jury and you will be pleading guilty to a charge preferred against you by a District Attorney's Information filed with the court.

IF YOU PLEAD GUILTY, THERE WILL BE NO TRIAL. YOU WILL BE WAIVING THE RIGHTS OUTLINED ABOVE, EXCEPT YOUR RIGHTS RELATING TO REPRESENTATION BY AN ATTORNEY. THE STATE WILL HAVE NOTHING TO PROVE AND YOU WILL STAND GUILTY ON YOUR GUILTY PLEA, BY ENTERING A PLEA OF GUILTY, YOU WILL ALSO WAIVE YOUR RIGHT TO APPEAL, UNLESS (1) YOU HAVE, BEFORE ENTERING THE PLEA OF GUILTY, EXPRESSLY RESERVED THE RIGHT TO APPEAL WITH RESPECT TO A PARTICULAR ISSUE OR ISSUES, IN WHICH EVENT APPELLATE REVIEW SHALL BE LIMITED TO A DETERMINATION OF THE ISSUE OR ISSUES RESERVED, OR (2) YOU HAVE TIMELY FILED A MOTION TO WITHDRAW THE PLEA OF GUILTY AFTER PRONOUNCEMENT OF SENTENCE ON THE GROUND THAT THE WITHDRAWAL IS NECESSARY TO CORRECT A MANIFEST INJUSTICE, AND THE COURT HAS DENIED YOUR MOTION TO WITHDRAW YOUR PLEA, OR THE MOTION HAS BEEN DEEMED DENIED BY OPERATION OF LAW.

If you are **convicted of a misdemeanor crime of domestic violence**, which has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, against your current or former spouse; your child of whom you are a parent or guardian; a person with whom you share a child in common; a spouse, parent, or guardian with whom you are, or have been, cohabiting or to whom you are similarly situated, **and you ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition, or if you receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, YOU ARE SUBJECT TO BEING PROSECUTED IN FEDERAL COURT FOR VIOLATING 18 U.S.C. 922(g)(9).**

IF YOU HAVE A RIGHT TO APPEAL UNDER ONE OF THE CONDITIONS ABOVE AND YOU ARE DETERMINED BY THE COURT TO BE INDIGENT, COUNSEL WILL BE APPOINTED TO REPRESENT YOU ON APPEAL IF YOU SO DESIRE AND IF THE APPEAL IS FROM A CIRCUIT COURT JUDGMENT OR SENTENCE, A COPY OF THE RECORD AND REPORTER'S TRANSCRIPT WILL BE PROVIDED AT NO COST TO YOU. IF THE APPEAL IS FROM A MUNICIPAL OR DISTRICT COURT JUDGMENT TO CIRCUIT COURT, YOU HAVE A RIGHT TO DEMAND A JURY TRIAL IF YOU INDICATE YOUR WISH TO ASSERT THIS RIGHT ON THE NOTICE OF APPEAL.

IF YOU HAVE ANY QUESTIONS ABOUT YOUR RIGHTS OR THE CONSEQUENCES OF PLEADING GUILTY, PLEASE LET THE COURT KNOW NOW AND FURTHER EXPLANATION WILL BE MADE.

**I have addressed the defendant and determined that he has voluntarily entered his guilty plea.**

Date

Judge

**ATTORNEY'S CERTIFICATE**

I certify that the above was read by the defendant or read and/or explained to the defendant by me; that I explained the penalty or penalties to the defendant, that I discussed in detail the defendant's rights and the consequences of pleading guilty; and that, in my judgment, the defendant understands the same and that he/she is knowingly, voluntarily, and intelligently waiving his/her rights and entering a voluntary and intelligent plea of guilty. I further certify to the court that I have in no way forced or induced the defendant to plead guilty and, to my knowledge, no one else has done so.

Date

Attorney

**DEFENDANT'S STATEMENT OF WAIVER OF RIGHTS AND PLEA OF GUILTY**

I certify to the court that I have read the matters set forth above or have had them read to me; that my rights have been discussed with me in detail and fully explained; that I understand the charge or charges against me; that I understand my rights, the punishment or punishments provided by law as may apply to my case, and I understand the consequence of pleading guilty; that I am not under the influence of any drugs, medicines, or alcoholic beverages; and I have not been threatened or abused or offered any inducement, reward, or hope or reward to plead guilty other than the terms of the plea agreement which will be stated on the record. I further state to the court that I am guilty of the charge to which I am entering a plea of guilty, that I desire to plead guilty, that I made up my own mind to plead guilty, and that I knowingly, intelligently, and voluntarily waive my right to a trial in this case. I further state to the court that I am satisfied with my attorney's services and his/her handling of my case.

Date

Defendant

## XV. Sentencing Commission Rosters

### ALABAMA SENTENCING COMMISSION

Director: Lynda Flynt  
 300 Dexter Avenue Suite 2-230  
 Montgomery, AL 36104  
 334.954.5095 or 1.866.954.9411 ext. 5095 Fax 334.954.5201  
 E-Mail: [sentencing.commission@alacourt.gov](mailto:sentencing.commission@alacourt.gov) .  
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**Coalition Against Rape, Alabama**

P.O. Box 4091  
Montgomery, AL 36102-1548

(334) 264-0123

**Community Corrections, Association**

P.O. Box 790

Russellville, AL 35653

Eugene Pierce, President

Director of Franklin County Community  
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**Dale County**

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Jeff Williams, Community Corrections  
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**Crime Victims Compensation  
Commission**

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1-800-541-9388

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Montgomery, AL 36101

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Maury Mitchell, Director  
Roger Humber, Deputy Director

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1-866-406-8022  
<http://www.acjic.alabama.gov>

**Criminal Rules, Supreme Court  
Advisory Committee**

Bill Bowen, Chair

Bob McCurley, Reporter

Alex Jackson, Court Liason

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(334) 229-0667

**District Attorney's Association –  
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515 South Perry Street  
Montgomery, AL 36104

Randy Hillman, Executive Director

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Judge Pete Johnson, Chairman

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<http://www.adfs.state.al.us>

**Implied Consent Unit**  
1152 Highway 31  
Calera, AL 35040

(205) 621-4696

**Laboratories**

C. J. Rehling, Auburn  
Huntsville  
Florence  
Birmingham/Hoover  
Jacksonville

(334) 887-7011  
(256) 539-1401  
(256) 767-0710  
(205) 982-9292  
(256) 782-5627

**Laboratories**

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Montgomery  
Dothan  
Mobile

(205) 345-4011  
(334) 242-2938  
(334) 793-0615  
(251) 471-7026

**Legislature**

**Joint Legislative Committee on  
Prison Overcrowding**

(334) 242-7437

Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

Representative John Rogers, Chair

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Senator Myron Penn, Vice Chair

(334) 242-7868 (334) 738-4486

Senator Parker Griffith

(334) 242-7846 (256) 536-7344

Senator Pat Lindsey

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Representative Henry White

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Alabama State House  
Room 530  
11 S. Union Street  
Montgomery, AL 36130

Senator Myron Penn, Co-Chair (334) 242-7868  
Alabama State House  
Room 731  
11 S. Union Street  
Montgomery, AL 36130

**Mental Health & Mental Retardation, Department of**  
100 North Union Street  
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<http://www.mh.alabama.gov>

John Houston, Commissioner  
Kent Hunt, Associate Commissioner,  
Substance Abuse Services Division  
Courtney Tarver, Director of Legal Division

**Pardons and Paroles, Board of**  
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## **Transition Centers**

### **Women's Transitional Facility**

LIFE Tech – Wetumpka  
8476 US Highway 231  
Wetumpka, AL 36092

(334) 514-5100  
(334) 514-5101 fax

Sharon Ziglar, Division Director

(334) 353-3480  
[sharon.ziglar@alabpp.gov](mailto:sharon.ziglar@alabpp.gov)

David Still, LIFE Tech Director

### **Men's Transitional Facility**

LIFE Tech – Thomasville  
2115 Bashi Road  
Thomasville, AL 36784

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(334) 637-3111 fax

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Darrell Morgan, LIFE Tech Director

## **Public Safety, Department of**

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### **Administrative Division**

Director  
Assistant Director  
Division Chief  
Legal Office

(334) 242-4394  
(334) 242-4703  
(334) 242-4428  
(334) 242-4392

### **Alabama Bureau of Investigation Division**

Division Chief  
Assistant Chief  
Criminal Information Center  
Missing and Exploited Children Unit  
Investigative Services  
Identification/AFIS Unit

(334) 353-2201  
(334) 353-2202  
(334) 353-1172  
(334) 353-1172, or 1-800-228-7688  
(334) 353-1100  
(334) 353-4320

### **Sheriff's Association**

514 Washington Avenue  
Montgomery, AL 36104-4385

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Bobby Timmons, Executive Director

**Supreme Court, Clerk of**  
Bob Esdale  
300 Dexter Avenue  
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